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"Preparing or manufacturing goods for
"trade" - - - F.C. 78

See FACTORIES ACTS.

"Reasonable cause" - - - Ct. Arb. 160
See WORKERS' COMPENSATION—
GENERAL.

WORKERS' COMPENSATION—ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

— Coronary Thrombosis — Angina of Effort — Contradictory Medical Evidence — Report of Medical Referee — Distinguishing Characteristics Explained — Workers' Compensation Act, 1922, s. 3.

EAGLE v. LEONARD AND DINGLEY,
LTD. - - - Ct. Arb. 132

WORKERS' COMPENSATION — ASSESS- MENT.

— General Neurasthenia — Policy of Court not modified — Workers' Compensation Amendment Act, 1936, s. 9.

STEWART v. WELLINGTON CITY COR-
PORATION - - - Ct. Arb. 127

WORKERS' COMPENSATION—LIABILITY FOR COMPENSATION.

1. — Scheduled Injury to Right Fore-
finger — No loss of Earning Capacity —
Whether "Permanent loss of the use of"
damaged Finger-joint — Workers' Compensa-
tion Act, 1922, s. 8, Second Schedule.

NATTA v. WELLINGTON HARBOUR BOARD
Ct. Arb. 124

2. — Worker engaged on Contract as
well as in Temporary Work for Wages at Time
of his Death — Major Portion of his Income

over Period of Years derived from Contracts
with County and not from Wages as a Servant
— Nature of Widow's Dependency on his
Earnings — Workers' Compensation Act, 1922,
ss. 4 (2), 5 (5).

DAWSON v. SOUTHLAND COUNTY
Ct. Arb. 40

WORKERS' COMPENSATION—PRACTICE.

— Practice — Nonsuit — Powers of Court —
Workers' Compensation Regulations (1909
New Zealand Gazette, 717), R. 124.

BRINDLE v. WELLINGTON HARBOUR
BOARD - - - Ct. Arb. 111

WORKERS' COMPENSATION—GENERAL.

1. — Delay in giving Notice of Acci-
dent — Whether "Reasonable cause" for
such Delay — Workers' Compensation Act,
1922, s. 26 (1) (2).

GIRVIN v. BAY OF ISLANDS COUNTY
Ct. Arb. 160

2. — Non-fatal Accident — Commuta-
tion of Weekly Payments — Disposal under
Order of the Court — Workers' Compensa-
tion Act, 1922, s. 5 (1).

WHITEHEAD v. WAIKOHU COUNTY
Ct. Arb. 230

STORER MEEK AND COMPANY,
LIMITED (IN LIQUIDATION) v. WELLINGTON
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S.C.
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1936.

Nov. 6;

Dec. 9.

MYERS, C.J.

*Municipal Corporation—Powers—Lease—Surrender and Grant of new Lease
“at a rent to be fixed”—Whether Corporation has Power to grant fresh
Lease subject to Statutory Increases or Reductions present and future—
Covenant for submission to Arbitration of Question of Increase of Rent—
Municipal Corporations Act, 1933, s. 162.*

A Municipal Corporation has power under s. 162 of the Municipal Corporations Act, 1933, to accept a surrender of a lease for twenty-one years, with a right of renewal from time to time at periodical valuations, and to grant a fresh lease to the “former lessee” upon the same terms and conditions except as to rental, the rental under the new proposed lease to be the same as that originally reserved under the existing lease; but subject to a reduction of 20 per cent. as long as the provisions of Part III of the National Expenditure Adjustment Act, 1932, relating to rent should remain in force so that they would have affected the said lease if still subsisting, and subject to such future statutory increases or reductions to come into effect during the remainder of the term of the present lease as would have affected the present lease if still subsisting. There should be included in such new lease a covenant by the lessor for the submission to arbitration of the question of increase of rent in the event of a claim thereafter by the Corporation for an increase and the Court refusing jurisdiction.

Sargood v. Wellington Harbour Board(1), and *John Fuller and Sons v. Mayor, &c., of Wellington*(2), followed.

(1) (1905) 25 N.Z.L.R. 268.

(2) (1912) 32 N.Z.L.R. 41.

ORIGINATING SUMMONS asking for a declaratory order interpreting the provisions of s. 162 of the Municipal Corporations Act, 1933, and specifically defining the powers of the defendant Corporation thereunder to accept a surrender of a lease for twenty-
5 one years with a right of renewal from time to time at periodical valuations, and to grant a fresh lease to the “former lessee” upon the same terms and conditions except as to rental, the rental under the new proposed lease to be the same as that originally reserved under the existing lease; but subject to a reduction of 20 per cent.
10 as long as the provisions of Part III of the National Expenditure Adjustment Act, 1932, relating to rent shall remain in force so that they would have affected the said lease if still subsisting, and subject to such future statutory increases or reductions to come into effect during the remainder of the term of the present lease
15 as would have affected the present lease if still subsisting.

Section 162 of the Municipal Corporations Act, 1933, is as follows:—

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The Council may by special order, on such terms as it thinks fit, accept a surrender of any lease; and may again, subject to the provisions of this Act, lease the land comprised in the surrendered lease; or, if it thinks fit, may grant to the former lessee a new lease for the remainder of the term of the surrendered lease at a rent to be fixed by the Council by special order either before or after the surrender, and on any terms or conditions authorized by this Act.

5

In particular, and this was the only question really which the originating summons raised, the parties asked: Has the defendant Corporation power to accept a surrender of the said memorandum of lease and to grant a fresh lease upon the terms above stated?

10

Harding, for the plaintiff.

O'Shea, for the defendant.

Cur. adv. vult.

MYERS, C.J. I can see no material distinction between this case and the two cases which were decided some years ago by *Stout*, C.J.—*Sargood v. Wellington Harbour Board*(1) and *John Fuller and Sons v. Mayor, &c., of Wellington*(2). If it be suggested that the rental under the proposed lease has to be "fixed," the answer is *id certum est quod certum reddi potest*: and a rental on the proposed terms will therefore be a "fixed" rental.

15

20

I suggested on the argument that the covenant by the lessee in the new lease to submit, on the application of the lessor in that behalf, to the jurisdiction of the Court to increase the rent under s. 31 of the National Expenditure Adjustment Act, 1932, and its amendments, might be valueless to the Corporation as the Court might refuse to act on such an agreement contained in a lease to which the Act does not apply. I said, therefore, that if it was competent for the Corporation to accept a surrender and grant a new lease to the former lessee, there should be a covenant by the lessor for the submission to arbitration of the question of increase of rent in the event of a claim hereafter by the Corporation for an increase and of the Court declining jurisdiction. Counsel said that if the question raised by the originating summons were answered in the affirmative a covenant to that effect would be included in the new lease. I think that there should be such a covenant, and, subject to its inclusion, the question asked by the originating summons is answered in the affirmative.

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I was asked by counsel to delay my consideration of this case pending the submission by them of a joint memorandum on a question to which only passing reference was made during the

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(1) (1905) 25 N.Z.L.R. 268.

(2) (1912) 32 N.Z.L.R. 41.

argument and which is not raised by the originating summons. Since then a joint memorandum has been submitted. It raises an entirely new question under the Mortgagors and Lessees Rehabilitation Act, 1936, and the possibility is suggested that by reason of
5 certain provisions of that Act there may be no necessity for a new lease to be granted to the present lessee. The main object of the original lessee and its transferee is to enable the liquidation of the original lessee, an incorporated company, to be completed. The suggestion is that this result may be brought about by reason of
10 the liability of the original lessee being extinguished automatically under the Mortgagors and Lessees Rehabilitation Act unless the Corporation takes active steps to keep the liability in existence, which steps it need not take and has no intention of taking. Counsel, however, seem to be in some doubt as to whether or not
15 the liability of the original lessee would be automatically extinguished. They suggest that the Court might see its way to adjudicate on that point. I do not, however, feel that I am called upon, or that it would be right, to decide the matter in this present proceeding. All I am called upon to do, and in my opinion should
20 do, is to answer the question specifically asked by the originating summons, and that question I have already answered.

Question answered accordingly.

Solicitors for the plaintiff: *Meek, Kirk, Harding, and Phillips* (Wellington).

Solicitor for the defendant: *J. O'Shea*, City Solicitor (Wellington).

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November 30,
December 1,
January 26.

LORD ATKIN.

LORD

THANKER-
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LORD

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LORD

MAUGHAM.

[IN THE PRIVY COUNCIL.]

AUCKLAND CITY CORPORATION AND AUCKLAND TRANSPORT BOARD - - - - - APPELLANTS

AND

ALLIANCE ASSURANCE COMPANY, LIMITED - - - - - RESPONDENT.

Currency—Local Authority issuing Debentures—Moneys secured payable in Auckland or London at Holder's Option—Option to receive Payment in London exercised—Whether Payment in London to be made in English or in New Zealand Currency—Power of Local Authority to pay Difference in Exchange—Local Bodies' Loans Act, 1913, ss. 3, 8, 9, 10, 26, 27, 32, 33, 37, 42.

Where a contract for payment of money is expressed in terms of a unit of account common to two or more countries, such as the "pound," it must be decided, as at the date of the contract, what currency is meant as the currency or measure of value in which the contract obligation is to be discharged.

In the absence of contrary evidence of actual intention, the currency meant is the currency of the country in which the contract stipulates payment is to be made.

The measure of value expressed in the contract by the word "pound" has to be ascertained as at the date when the contract requires payment to be effected, and that depends on the precise state of the relevant currency at that date.

Consequently, where in terms of a contract made by the appellant corporation in Auckland on February 16, 1920, the payment for the purchase under statutory powers of a tramway undertaking was satisfied by a payment in cash and the issue under the Local Bodies' Loans Act, 1913, of debentures and interest coupons expressed to be payable in "pounds" at the holder's option either in Auckland or in London, those coupons and debentures are payable in English currency without any allowance for exchange, when they fall due, always provided that the bearer exercises the option to be paid in London.

Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.(1), applied.

Westralian Farmers, Ltd. v. King Line, Ltd.(2), and *Saskatoon City v. London and Western Trusts Co., Ltd.*(3), referred to.

No question of *ultra vires* arose by reason of the use of the word "pound" in the Local Bodies' Loans Act, 1913, on the plain reading of which the "pound" contemplated and authorized by that statute meant the common unit of account in Great Britain and in various parts of the British Empire; and the currency which it connoted in the case of any particular loan was determinable by the place, whether within New Zealand or not, stipulated as the place of payment in the debentures or interest coupons comprising the contract between the parties.

(1) [1934] A.C. 122.

(2) (1928) 48 T.L.R. 598; 43 Ll. L.R. 378.

(3) [1934] 1 D.L.R. 103.

Australasian Temperance and General Mutual Life Assurance Society, Ltd. v. Mount Albert Borough(4) and *Wanganui-Rangitikei Electric-power Board v. Australian Mutual Provident Society*(5) referred to.

Payne v. Deputy Federal Commissioner of Taxation(6) distinguished.

So held by the Judicial Committee of His Majesty's Privy Council, affirming the judgment of the majority of the Court of Appeal, reported [1936] N.Z.L.R. 413, where the facts are given and the terms of the debentures and coupons are set out.

(4) [1935-36] N.Z.L.G.R. 157.

(6) [1936] A.C. 497; [1936] 2 All E.R. 793.

(5) [1934] 50 C.L.R. 581.

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APPEAL (No. 86 of 1936) from a judgment of the Court of Appeal of New Zealand, reported [1935-36] N.Z.L.G.R. 263, in an action removed into the Court of Appeal for hearing. The facts sufficiently appear from that judgment.

- 5 *Hon. S. O. Henn Collins, K.C., Alexander Ross, and Joseph Stanton* (of the New Zealand Bar) for the appellants. At all material times the English pound and the New Zealand pound were different, the currency of England was different from the currency of New Zealand, and there was not a unit of account
10 common to England and to New Zealand. On a proper construction of the debenture and the coupon attached thereto, the £100 and £2 12s. 6d. are payable in New Zealand currency, and the respondent company is accordingly entitled to be paid only in New Zealand money converted into sterling at the rate of exchange current
15 at the date of conversion.

It would have been *ultra vires* of the corporation to issue debentures for payment in any currency but New Zealand currency.

- Counsel referred to *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*(1); *Payne v. Deputy Federal*
20 *Commissioner of Taxation*(2); *Saskatoon City v. London and Western Trusts Co., Ltd.*(3); *Gisborne Borough v. Auckland Provincial Patriotic and War Relief Association*(4); *Mowbray, Robinson, and Co. v. Rosser*(5); *International Trustee for the Protection of Bondholders Aktiengesellschaft v. The King*(6);
25 *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.*(7); *Wanganui-Rangitikei Electric-power Board v. Australian Mutual Provident Society*(8); *Landsdowne v. Landsdowne*(9); *Ottoman Bank of Nicosia v. Dascalopoulos*(10); and *Broken Hill Proprietary Co., Ltd. v. Latham* (11).

(1) [1934] A.C. 122.

(2) [1936] A.C. 497; [1936] 2 All E.R. 793.

(3) [1934] 1 D.L.R. 103.

(4) [1916] N.Z.L.R. 218.

(5) [1922] 91 L.J.K.B. 524.

(6) [1936] 3 All E.R. 407.

(7) (1932) 48 C.L.R. 391.

(8) (1934) 50 C.L.R. 581.

(9) (1820) 2 Bl. 60; 4 E.R. 250.

(10) [1934] A.C. 354.

(11) [1933] Ch. 373.

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Gavin T. Simonds, K.C., and Wilfrid Barton, for the respondent company. It is not *ultra vires* of the appellant corporation when the respondent company has elected, as it is entitled to do by the contract, to be paid its interest in London, to pay that interest at its nominal value in British currency. That is what the contract plainly provides that the appellants must do. Upon the exercise of the option, London was the *locus solutionis* and the place of performance. 5

[Their Lordships had intimated that they did not desire to hear the respondent company upon the other issues.] 10

Cur. adv. vult.

The judgment of their Lordships was delivered by

LORD WRIGHT. The question to be determined in this appeal is, What are the rights of the Alliance Assurance Co., Ltd., the respondents, under a debenture bond for £100 and the coupons still outstanding under it of which they are bearers? The bond and coupons were issued by the mayor, councillors, and citizens of the City of Auckland in New Zealand, the defendants in the action and the appellants before this Board. The Auckland Transport Board who were third parties in the action are also appellants, but no question arises in this appeal as to their position. 15

The debenture bond is numbered 1744 and is for £100. It was issued under the common seal of the appellant corporation on February 9, 1920. It is headed :

Auckland City Council, Auckland, New Zealand. Auckland City Tramway Loan of £1,250,000. Secured on the revenues of the City of Auckland, subject to the existing loans chargeable on such revenues, 25

and is payable at the holder's option either in Auckland, New Zealand, or in London on July 1, 1940, and is expressed to be issued by the Auckland City Council, New Zealand, under the Local Bodies' Loans Act, 1913, and s. 26 of the Appropriation Act, 1915. It provides by its terms that : 30

On presentation of this debenture either at the Bank of New Zealand, Auckland, New Zealand, or at the Bank of New Zealand, London, England (at the option of the holder hereof), on the first day of July, 1940, the bearer will be entitled to receive £100. Interest on this debenture will cease after the day when the payment falls due unless default is made in payment. This debenture bears interest at the rate five pounds five shillings per centum per annum payable on the first days of January and July in each year on presentation of the attached coupons. 35 40

The coupon now in suit is No. 33. It is headed :

Auckland City Tramway Loan, 1920. Of the City of Auckland, New Zealand, issued under the Local Bodies' Loans Act, 1913, and s. 26 of the Appropriation Act, 1915, secured on the revenues of the City of Auckland, subject to the existing loans chargeable on such revenues. 45

It contains the following provision :

On presentation of this coupon at the Bank of New Zealand, London, England, or Auckland, New Zealand, at the option of the holder for the time being on or after the first day of January, 1936, the bearer will be entitled to receive £2 12s. 6d.

It is signed by the mayor and the city treasurer. The series of debentures, of which No. 1744 forms one, was issued under the following circumstances. An English registered company had, some years before 1919, constructed a tramway system in the

City of Auckland. In 1919, while they were operating the system, they gave an option to the appellant corporation to purchase the tramway undertaking with all its assets. In consequence, an agreement was entered into dated February 16, 1920, between the English tramway company and its mortgagees, an English

investment company, on the one hand, and the appellant corporation on the other, for the sale of the whole of the tramway undertaking, its lands, its various rights, and all its assets for the total aggregate sum of £1,227,201 8s. 7d. The price was to be satisfied by a payment to the vendors of £1 8s. 7d. in cash,

and by the issue to them of debentures for the total sum of £1,227,200. According to the agreement, the rate of interest on a certain proportion of these debentures was £5 per cent. per annum, and as to the balance £5 5s. per cent. per annum. The agreement provided that the debentures should rank *pari passu*

and should be payable both as regards principal and interest at the option of the holder for the time being either in London or Auckland, and should be in denominations from £20 to £1,000, as required by the vendors. The consideration for the sale was arrived at on the basis of certain items which were set out in the

agreement. Certain of these items were sums of sterling, in particular, the amount of the mortgage debt of the tramway undertaking which was £393,750, and the amount representing the net profits, subject to an allowance, of the tramway company for the year ending June 30, 1919. Other sums were presumably

in New Zealand currency, such as the sum representing the liabilities of the tramway company existing at the date of the agreement. There was nothing expressed in the agreement to show in what currency the sum of £750,000, which was the major part of the consideration, was calculated. The transaction thus

took the form of a sale by the vendors to the appellants as purchasers of the property for the sum above stated. This

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of the purchase price, which took the form of the issue of the debentures.

The dispute which has now arisen is whether the respondents are entitled to be paid the principal and interest in sterling—that is, in the currency of England—on the assumption or basis of their having availed themselves of the option to be paid in London, or whether their right on that footing is merely to be paid in the currency of New Zealand, which in 1936 was considerably depreciated. The action, which was brought by the respondents, claimed a declaration that they were entitled to be paid in sterling—that is, in the currency of England—both as to principal and interest, and in particular claimed payment of 13s. 1d., as being the difference between £2 12s. 6d., the sum due under the coupon in question, and the sum of £1 19s. 5d., the sum tendered to them in respect of their coupon when, having exercised their option to be paid in London, they duly presented the coupon for payment at the Bank of New Zealand in London. This sum of 13s. 1d. represented the difference in value between sterling and New Zealand currency as applied to the amount of £2 12s. 6d. expressed in the coupon.

The rights and liabilities under the debenture and the coupon depend on the terms set out in them. For the purposes of this appeal, the question can be considered as if the instrument simply provided for payment in London; the option to require payment in New Zealand may be disregarded, as the actual or assumed basis of the proceedings is that the London option has been duly exercised. The instruments, as already stated, bear on their face a reference to the Local Bodies' Loans Act, 1913 (hereinafter called the Act of 1913), and s. 26 of the Appropriation Act, 1915. The latter Act is not material, but the former Act requires to be considered. The appellant corporation are a statutory body incorporated in New Zealand and are subject to the Act of 1913, which contains a code regulating the conditions and the procedure under which a local authority such as the appellant corporation are entitled to borrow money for public purposes, including the purchase or acquisition of any land, building, erection, or structure. It is not disputed that the appellant corporation are bound by the conditions of the Act, and that these conditions are made part of the terms of the debenture and coupon by the express reference to the Act already mentioned. The various requirements of the Act for the purpose of obtaining the consent of the rate-payers were in form duly complied with. The Act also provided for the security which might lawfully be pledged for a loan. Certain

sections of the Act, which have been the subject of argument before their Lordships, call for special mention. These deal in particular with the form and contents of any debentures. Thus it is enacted that the debentures shall be for sums of not less than 5 £20 and not more than £1,000, and shall be in the form set out in the Schedule. That form was precisely followed in the series of debentures in question. The matter most material to be noted is that the debenture in the scheduled form is to be for [blank] pounds, using the symbol "£." This agrees with the provision in the 10 body of the Act just quoted that the sum is to be for not less than £20 and not more than £1,000. The Act also prescribes that the yearly interest on every debenture shall not exceed 5½ per cent., and shall be payable half-yearly or otherwise. There is also a prescribed form of coupon, which requires the amount to 15 be expressed in pounds. The coupon in question complies with the prescribed form. Section 29 (1) provides that the local body may appoint any incorporated company or association or any such company or association together with one or more persons within or out of New Zealand to be agents for raising and 20 managing any loan authorized to be raised under this Act, such agent to have full power to raise the loan and to deal with the moneys subject to the direction of the local authority. The Act also contains a series of provisions dealing with the repayment of the loan, of which the most material are s. 32, which provides 25 that the sum of money named in any debenture shall be payable at the place within or out of New Zealand named in the debenture at the time named thereon, being not longer than fifty years from the issue thereof, and s. 33, which requires the local authority to make provision for a repayment either by means of a sinking 30 fund, or by periodical drawings. Section 42 may also be mentioned. That section provides for the case of default being committed in payment of the sum secured by any debenture or any coupon when it is presented at the place where, and the time when, it is payable or subsequently. In that event the holder is entitled 35 to apply to a Judge of the Supreme Court—that is, of New Zealand—by a petition in a summary way for relief under the Act, and the Judge is authorized to appoint a receiver of the local fund or other property of the local authority which is liable under the provisions of the Act for the payment of the debenture or 40 coupon.

In 1913, when this Act was passed, the gold sovereign was legal tender both in England and New Zealand, and the various notes current in both countries were redeemable in gold. In

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both countries the unit of account, the pound, was the same. The word "pound" accordingly at that time, whether used in an instrument made in New Zealand, or in an instrument made in England, had, in the full sense of the term, the same connotation; it meant the same unit of account, and the measure of value in currency which it connoted was the same—namely, the gold sovereign, minted by the Royal Mint, whether at the English Mint or at its Australian branch or branches. It is not necessary here to deal specifically with shillings and pence; these also were the same in both countries as units of account, and were represented as measures of value in currency by silver and bronze token coins. On the outbreak of the Great War in August of 1914, changes were made in the currency in each of the two countries. Both in England and in New Zealand gold coins for all practical purposes went out of circulation. In England the export of gold, which had previously during the War been prohibited by regulation, was prohibited by an Act of 1920. In 1925, by the Gold Standard Act of that year, the Bank of England, which had been under an obligation to pay its own notes and the Treasury notes then current in gold, was relieved of that obligation, and was only required to sell bullion in bars of about 400 oz. at a fixed rate. Then in 1931, by the Gold Standard Amendment Act of that year, the obligation to sell gold bullion at a fixed rate was suspended. Thus, in England by 1931 the country had gone off the gold standard and the notes of the Bank of England, which constituted the note circulation, were no longer convertible in gold. In New Zealand a somewhat different course was taken. Before 1913 there were a certain number of trading-banks in New Zealand issuing their notes of a denomination of £1 or upwards, which were in form promises to pay a pound or pounds sterling.

In 1914 there was passed in New Zealand the Banking Amendment Act, 1914, under which the Governor-General in Council was empowered by Proclamation to declare that notes payable on demand by any bank named in the Proclamation and subsequent issues should be, during the period limited by the Proclamation, legal tender in New Zealand. While any such Proclamation was current, the condition that the bank should pay notes of its own issue in gold on presentation at the bank was to be suspended for the period limited by the Proclamation first made under the Act or by successive Proclamations, if more than one. But the Act provided that the Governor-General in Council might require that adequate security should be given by the bank for the performance of the condition that the bank

would duly pay its notes in gold after the expiration of the period limited by the Proclamation or Proclamations. During the period limited by any Proclamation the export of gold was prohibited, except with the consent in writing of the Minister of Finance.

- 5 In fact a Proclamation was made in 1914 under this Act for two years, and thereafter further such Proclamations were successively made from time to time. These Proclamations covered the whole period from August, 1914, until August, 1934. At that latter date the Reserve Bank of New Zealand Act, 1933, came into
- 10 operation, under which the Reserve Bank of New Zealand was empowered to issue bank-notes and the authority of the various trading-banks to issue or reissue bank-notes in New Zealand was determined. Thereupon the bank-notes of these banks practically went out of circulation. The bank-notes of the Reserve Bank,
- 15 which are now practically the only notes in circulation in New Zealand, are in form a promise to pay so many pounds, and contain no reference to sterling, unlike the notes previously issued by the trading-banks. The position in effect has thus been that from 1914 until 1934 the redeemability of the note currency in gold
- 20 was suspended. No doubt the Act of 1914 was originally intended to be an emergency measure for the time, but by the successive renewal of Proclamations the operation of the Act was continued, until in 1934 the note currency was finally and definitely made irredeemable in gold. These respective changes in the legal
- 25 tender or currency of the two countries have had a reflection in the rate of exchange and in the relative values *inter se* of the two currencies. If regard is had to the telegraphic selling rates, New Zealand on London, there had before 1914 been a variation depending, presumably, on the relation of supply and demand.
- 30 Thus from 1904 to 1914 the rate, New Zealand on London, was at 17s. 6d. per cent. premium. From December, 1917, to September, 1920, it was 20s. per cent. premium. It then rose for about two years, but in 1922 it was 5s. per cent. premium, and in 1924 for a short period it was at par; in 1925 it was at a discount; in
- 35 1930 the premium had actually risen to £5. Eventually in 1933 there was a steep rise in the premium; in January, 1933, the exchange stood at £125 New Zealand for £100 London, and in August, 1934, at £124 10s. It was in consequence of that marked divergence in value between the two currencies that the present
- 40 difficulty has arisen. Until that occurred the debenture coupons in cases where the London option was exercised were paid in English currency without question. But the appellants in and after 1934 contended they were only bound to pay in New Zealand currency, and in the result the present action was brought.

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The case was tried in the Court of Appeal under an order for removal to that Court on an agreed statement of facts. The Court was divided in opinion(1). The majority, consisting of *Ostler*, *Blair*, and *Kennedy*, JJ., were of opinion that the claim of the respondents should be upheld. *Reed*, A.C.J., dissented and was for deciding in favour of the appellant corporation. He was of opinion that the New Zealand pound was a different unit of value from the English pound, and was of a different value from the English pound, and that in all the circumstances of the case the proper inference to be drawn was that the moneys to be paid under the debenture and the coupon were to be computed in the New Zealand currency, free from any allowance or deduction for conversion from New Zealand currency into English currency. In his view, the contract was a purely New Zealand contract because it was made under the authority of the municipal law of New Zealand, and in reference to the purchase of an undertaking which was operated in New Zealand, and because repayment of the money was secured on property situated in New Zealand, and also because the debentures were delivered in New Zealand to be disposed of as the vendors of the tramway undertaking thought fit. He also relied on the circumstance that the contract was subject to the terms of the Local Bodies' Loans Act of 1913. The three Judges who took the contrary view were of opinion that in principle the case was governed by the decision of the House of Lords in the case of *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*(2), and accordingly that moneys payable on the debenture or the coupons, if the bearer elected to be paid in London, were payable in the appropriate number of pounds according to the currency of England—that is, in sterling or in British pounds. Though the proper law of the contract was New Zealand law, that did not affect, in their opinion, the result in this case, that where the place of payment was in London the money was payable in sterling. They further held that there was nothing in the terms of the Act of 1913 to lead to any other conclusion because they held that it was not *ultra vires* to contract loans such as those in question in any other than New Zealand currency, and that the terms of the Act did not compel, irrespective of the place of payment, a construction of the word "pound," connoting a payment according to the currency of New Zealand.

Their Lordships are in substantial agreement with the conclusions of the majority of the Court. Up to a point, in their

(1) [1935-36] N.Z.L.G.R. 263.

(2) [1934] A.C. 122.

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judgment, this case in principle is precisely governed by the opinions of the House of Lords in the *Adelaide* case. That authority, it is true, had reference to a contest whether sterling—that is, English currency, or Australian currency—was applicable, 5 but, for all purposes of the present appeal, there is no difference in substance between the divergence which occurred in the currency values as between England and Australia and the divergence which occurred in the currency values as between England and New Zealand. There are two dates which in a case of this sort 10 may have to be considered as material dates; one is the date when the contract is made, and the other is the date at which the contract requires payment to be effected. It is as at the latter date that the measure of value expressed by the word “pound” in the contract will have to be ascertained, and that 15 will depend on the precise state of the relevant currency at the particular date, but it is as at the date of the contract that it must be decided what currency is meant by the contract as the currency or measure of value in which the contract obligation is to be discharged. That latter question can only be settled by 20 determining as a matter of construction what in all the circumstances of the case is the meaning of the word “pound” used in the contract. This problem only arises where the contract uses a common unit of account, like the pound, as the denomination in which the obligations are expressed. A difficulty arose in 25 the *Adelaide* case, because in 1921 a change was made in the articles of association of the Adelaide company, which was an English registered company, whereby the place of payment for the debenture was shifted from London to Adelaide in Australia. Up to that time, while the place of payment was in London, there 30 could be no question that the term “pound” used in the articles of association had reference to English or sterling currency. In 1921, when the articles were changed in the sense explained, there were no express terms inserted to define in what currency the payment was to be made. The reason for that omission no 35 doubt was that the parties did not think about it because at that time the difference between the sterling pound and the currency pound was little more than negligible; indeed it could not definitely be pronounced in what direction the exchange would go, whether in favour of London or Australia. But when, at a 40 much later date—namely, 1931—there emerged a very substantial divergence in the values of the two currencies, the problem was raised which was eventually settled by the House of Lords. The five Lords of Appeal who gave judgment in the House of Lords

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were all in agreement as to what the decision of the House should be. Lord *Russell* puts the problem and the answer in these terms: He says: "If this be the correct view, this problem
" would resolve itself into a case of the company becoming indebted
" from time to time in amounts payable in Australia and expressed
" in terms of units of account common to Australia and England.
" The question then is, how can the company discharge that
" indebtedness? The answer can, I think, only be in whatever
" currency is legal tender in the place in which the indebtedness
" is dischargeable. It is not a question what amount of coins
" or other currency has the debtor contracted to pay. A debt
" is not incurred in terms of currency, but in terms of units of
" account. It is a question of discharging a debt incurred in
" terms of units of account common to more than one country
" in the currency which is legal tender in the particular country
" in which the debt has to be paid"(3). It is quite clear that
the whole problem arose because of the divergence in value of
the two currencies, and it was solved, as a question of construction,
by determining what currency, on the true construction of the
contract, was connoted by the use of the word "pound." It
was held that in the absence of express terms to the contrary,
or of matters in the contract raising an inference to the contrary,
the currency of the country in which it was stipulated that
payment was to be made was the currency meant. Contracts
are expressed in terms of the unit of account, but the unit of
account is only a denomination connoting the appropriate
currency. The problem is only likely to arise where the contract
is made at a time when there is little or no practical difference
between the two currencies of the two countries concerned, or
where they have both the same currency and the same unit of
account, but subsequently at the due date of performance the
values of the two currencies have sharply diverged.

If at the time when the contract is made there is a practical
divergence in value between the two currencies, the parties in
all probability will expressly stipulate what currency is intended.
An illustration of such a case is to be found in *Westralian Farmers,
Ltd. v. King Line, Ltd.*(4). A charter-party made in September,
1930, for the charter of a British ship on a voyage from Western
Australia to Great Britain or the Continent contained various
stipulations for payments, some to be made in Australia and some
in Great Britain. The latter were stipulated to be payable in

(3) [1934] A.C. 122.

(4) (1932) 48 T.L.R. 598; 43 Ll. L.R.
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sterling, but the former sums were stipulated to be payable in Australian currency. The parties had thus by their express agreement excluded any question as to what currency was intended. It seems also that *Saskatoon City v. London and Western Trusts Co., Ltd.*(5), was decided on the principle that there was in that case an express term, embodied in the by-laws under which the debenture was issued, providing that the debentures and coupons were to be payable in lawful money of Canada or in sterling money of Great Britain. The debentures were expressed in dollars, and it was held that the terms of the by-laws excluded all other methods of payment than a payment either in lawful money of Canada or in sterling money, and, accordingly, that the debentures, which were expressed in dollars, were payable in Canadian dollars, though they were made payable at the offices of the Bank of Montreal in New York or at the offices of the said bank in London, England.

In the *Adelaide* case, however, there was no express term to show what currency was intended by the word "pound." The House of Lords held that the true meaning of the word "pound" must be determined on the basis of a rule depending on a well-known principle of the *Conflict of Laws*—namely, that the mode of performance of a contract is to be governed by the law of the place of performance. That principle, no doubt, is limited to matters which can be fairly described as being the mode or method of performance, and is not to be extended so as to change the substantive or essential conditions of the contract; but when it applies, as in the *Adelaide* case, it has the effect of introducing into the contract the law of currency or legal tender governing in the place of payment as a mode or method incidental to performance. Thus where there is a common unit of account, to which the same denomination applies, as is the case with the word "pound" here, the debt expressed in the common unit of account must, in the absence of contrary evidence of actual intention, be discharged by payment in the currency of the place of payment. That was the decision in the *Adelaide* case, which, subject to a further matter, to be next discussed, governs the present case.

In this case, as in the *Adelaide* case, the pound is the common unit of account. It is true that at the date of the debenture there was little or no practical difference between the value of the New Zealand currency in New Zealand and the value of the sterling currency in England; no doubt for that reason the parties did not feel it necessary expressly to stipulate which currency was intended by the contract. That was left to be determined by the Court in

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accordance with the general principles of law, and in accordance with the place of payment which the bearer adopted under the option given to him.

It has, however, been strenuously contended that there is a further factor to be taken into consideration here—namely, the conditions of the Local Bodies' Loans Act of 1913. The material provisions of that Act have already been set out in an earlier portion of this judgment. It is contended on behalf of the appellants that the Act of 1913 takes this case out of the ruling in the *Adelaide* case on one or other or on both of two grounds. It is said in the first place that the effect of the Act of 1913 was to render it *ultra vires* of the corporation to borrow in any other than pounds—that is to say, the pounds meant by the Act, which were New Zealand pounds—and that the contract must anyhow be so construed, whatever the place of payment, in order to prevent it being held *ultra vires* and void, on the principle *ut res magis valeat quam pereat*. It is further or alternatively contended on similar grounds that the *prima facie* rule of construction applied in the *Adelaide* case is excluded by the conditions of the Act of 1913 incorporated in the documents, which require that the debentures and coupons should be issued in pounds—that is, New Zealand pounds, as being the pounds postulated by the Act of 1913.

Their Lordships cannot accept either contention. They do not think any question of *ultra vires* arises. On the plain reading of the Act of 1913 they think that the "pound" contemplated and authorized by the Act means the common unit of account current in Great Britain and in various parts of the British Empire, and that the currency which it connotes in the case of any particular loan will be determined by the place, whether within New Zealand or outside of New Zealand, stipulated as the place of payment in the debenture. The sections of the Act of 1913 quoted above in this judgment show clearly that the place of payment contemplated by the Act may be a place either within or without New Zealand. This in particular appears from s. 32 and from s. 29 (1) and other sections which are quoted above. For obvious financial reasons, a country like New Zealand will desire to raise money in other than the local financial markets. Thus it may desire to float a loan in England or in one of the Australian States; if it floats such a loan and issues debentures expressed in pounds payable in London or in (*e.g.*) Melbourne, such a financial operation is within the conditions of the Act, and will carry with it, according to the rules of law now established, the consequence, that if nothing more is said in the debenture the pounds in question will connote

a currency either of England, if the loan is repayable in London, or of Australia, if the loan, for instance, is repayable in Melbourne.

That such a loan is within the provisions of the Act of 1913 has already been recognized by the Court of Appeal in New Zealand
 5 in the case of the *Australasian Temperance and General Mutual Life Assurance Society, Ltd. v. Mount Albert Borough*(6). In that case the debentures were issued in New Zealand under the Act of 1913 payable at the Bank of New Zealand, Melbourne, and were expressed to be in pounds. The question debated in that case
 10 was not the determination of the currency, but was whether the law of Victoria which had enacted a general reduction of the rate of interest payable in respect of loans, applied to the New Zealand contract, under which the interest on the loans was to be paid in Melbourne. The Court of Appeal in New Zealand held that
 15 it did not; they distinguished the *Adelaide* case on the ground that in the *Adelaide* case the question was merely as to the mode or method of performance, whereas in the case before them the Victorian law did not and could not have the effect of changing the substance of the New Zealand contract. It is, however, clear
 20 that the Court of Appeal treated the debentures as properly issued within the terms of the Act of 1913.

A similar decision was arrived at by a majority in the High Court of Australia in the case of the *Wanganui-Rangitikei Electric-power Board v. Australian Mutual Provident Society*(7), where
 25 debentures of a New Zealand corporation had been issued payable in New South Wales, and the question was whether the rate of the interest was reduced under a New South Wales statute—the Interest Reduction Act, 1931, and its amendments. It was held that the debenture was a New Zealand obligation and was not
 30 affected by the Act. The case is here referred to merely as a further illustration of the practice of validly issuing under the Act of 1913 debentures payable in pounds, but payable in other than New Zealand currency, because not payable in New Zealand.

A reference in the argument before their Lordships was made
 35 to a case of *Payne v. Deputy Federal Commissioner of Taxation*(8), in which there was some discussion of the decision in the *Adelaide* case. The decision of this Board, however, in *Payne's* case throws no light upon the matters at issue here. The only question in that case was whether under the Australian Income-tax Acts an
 40 Australian taxpayer who had received assessable income in pounds sterling under English securities was compelled, in bringing sterling

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(6) [1935-36] N.Z.L.G.R. 157.

(7) (1934) 50 C.L.R. 581.

(8) [1936] A.C. 497.

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income received in England and not remitted to Australia into his income-tax returns, to convert it to terms of Australian currency. It was held that he was.

For all these reasons their Lordships are of opinion that the appeal fails, and that the coupons in question are payable in English currency without any allowance for exchange and so also is the debenture when it falls due, always provided that the bearer exercises the option to be paid in London. They are also of opinion that the claim of the respondents to be paid 13s. 1d. succeeds. The judgment of the Court of Appeal in New Zealand will accordingly be upheld and the appeal dismissed. Their Lordships will humbly so advise His Majesty.

In accordance with an agreement between the parties no order is necessary respecting the costs.

Appeal dismissed.

Solicitors for the appellants: *Wray, Smith, and Halford* (London).

Solicitors for the respondent: *Dawes and Sons* (London).

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Local Authorities—Local Government Loans Board—Whether Power for Board to reconsider original Application for Loan which it declined to sanction—Governor-General's Consent to raising of Loan—Conclusive Proof of right of Local Authority to borrow—Local Government Loans Board Act, 1926, ss. 6 (1) (d), 7, 10, 11—Finance Act, 1932 (No. 2), s. 29—Fire Brigades Act, 1926, s. 31 (3)—Local Government Loans Board Regulations, 1927 (1927 New Zealand Gazette, 1513).

The Local Government Loans Board when it has declined under s. 6 (1) (d) of the Local Government Loans Board Act, 1926, to sanction a proposed loan applied for by a local authority is *functus officio* in respect of that application, and by s. 7 of the Act it cannot deal with a further application for its sanction in respect of the same loan proposals within a period of twelve months from the date of the Board's decision, unless there has been a material change of circumstances affecting the loan proposed.

Where the Board, having declined to sanction the proposed loan, although *functus officio*, reconsiders the original application and decides to grant it, such decision, if the only authority for the loan, would be bad. But where the Loans Board, in pursuance of s. 10 of the Act, notifies the Minister of Finance of its sanction and the Minister recommends the Governor-General in Council to consent to the raising of the loan, and the Governor-General in Council under s. 11 of the Act, as enacted by s. 29 of the Finance Act, 1932 (No. 2), gives his consent to the raising of the loan, the consent of the Governor-General in Council becomes, by virtue of subs. 3 of s. 11, conclusive proof of the right of the local authority to borrow in accordance with the determinations set forth therein, including the amount of the loan, and such consent is not dependent upon the validity of preceding acts by the local authority or the Loans Board. When the Governor-General's consent is produced in Court, the Court must regard it as conclusive of the local authority's right to borrow and cannot go behind that consent.

Although s. 3 of the Act of 1926 provides that the Governor-General's consent shall be given after compliance with the provisions of this Act, the effect of the said s. 11 is to make it clear that this requirement is directory, not mandatory, and that the breach of it does not entail any invalidity in the Governor-General's consent.

MOTION for writs of certiorari, prohibition, and injunction.

The plaintiff was a ratepayer of the Borough of Gisborne. The defendant Fire Board was without rating powers and derived its revenue in part from the Gisborne Borough Council, which, in turn, derived its revenue from the ratepayers of the Borough of Gisborne. The remaining defendants were the members of the Local Government Loans Board constituted under the Local Government Loans Board Act, 1926. At one time the Attorney-General was a defendant, but, by agreement, he was struck out as a party.

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On September 3, 1935, the Gisborne Fire Board made application to the Local Government Loans Board for a reconstruction loan of £12,000 for the year 1936. On October 10, 1935, the Loans Board, for certain reasons which they gave, declined to sanction the loan. The effect of this decision was communicated by the Loans Board to the Fire Board by letter on October 15. After this refusal, further representations were made to the Loans Board by representatives of the Fire Board. A report from an Inspector of Fire Brigades, dated January 29, 1936, and a report from the Public Works Department, dated February 4, 1936, which were not before the Loans Board when it made its decision of October 10, 1935, were forwarded to the Loans Board. On February 11, 1936, the Loans Board reconsidered the Fire Board's application and sanctioned the raising by the Fire Board of a loan of £11,000, and this decision was conveyed to the Fire Board by letter on February 12, 1936. It was not in dispute that the Board dealt with the same application in February as it dealt with in October.

Following on the Board's decision of February 11, an Order in Council was issued, dated March 11, 1936, consenting to the raising of loans by certain local authorities, and the Gisborne Fire Board reconstruction loan of 1936 was included therein: *1936 New Zealand Gazette*, 500. The Order in Council recited that the local authorities have respectively complied with the provisions of the Local Government Loans Board Act, 1926, but the consent was expressed to be in pursuance and exercise of the powers and authorities conferred on the Governor-General by s. 11 of the said Act, as set out in s. 29 of the Finance Act, 1932 (No. 2), and of all other powers and authorities enabling the Governor-General in that behalf.

In April, 1935, the plaintiff, alleging that the Fire Board had failed to comply with the necessary and precedent requirements of the Local Government Loans Board Act, 1926, and the Fire Brigades Act, 1926, to the giving of a valid consent by the Governor-General and to the making of a valid Order in Council, filed a statement of claim and a motion for writs of certiorari, prohibition, and injunction, on the ground that the consent of the Governor-General in Council and the said Order in Council, as far as they related to the defendant Fire Board and its proposed loan, were without validity, effect, or warrant in law.

The main grounds of objection were (a) that the public notice given by the Fire Board under the Local Government Loans Board Regulations, 1927 (*1927 New Zealand Gazette*, 1513), was defective in certain respects; (b) that the Loans Board was *functus officio* when it had declined to sanction the loan; (c) that s. 7 of the

Local Government Loans Board Act, 1926, did not apply; and (d) that when there was no effective sanction of the Fire Board's proposal by the Loans Board, there was nothing in law to which the Governor-General in Council could consent.

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5 *Burnard*, with *Iles*, for the plaintiff.

Blair, for the Gisborne Fire Board.

Nolan, for the other defendants, the Local Government Loans Board.

Cur. adv. vult.

10 SMITH, J. [After stating the facts, as above:] The first restriction upon the borrowing power of a Fire Board is contained in s. 31 of the Fire Brigades Act, 1926, which was a re-enactment of earlier legislation. This section provides that no money shall be borrowed by a Board under that section except with the consent
15 in writing of the Minister. Subsection 4 of s. 31 places a maximum limit on the loans which can be raised under this section, subject to the proviso that the Governor-General in Council may, on the application of any Fire Board, extend the powers of that Board to borrow moneys in excess of the limits fixed by s. 31. It thus
20 appears that, while the Minister's consent in writing to borrowing is required under this Act, the Governor-General alone can extend the limits of the loan. Now it is admitted that the Fire Board is also a local authority for the purposes of the Local Government Loans Board Act, 1926. Section 3 of that Act prevents a Fire
25 Board from borrowing except under the authority of that Act. Section 3 requires that, notwithstanding anything to the contrary in any Act, it is not lawful for a Fire Board to borrow without the precedent consent of the Governor-General in Council given "after compliance with the provisions of this Act." The effect
30 of this provision, it seems, is to direct the Governor-General to inquire whether there has been a compliance with the provisions of the Act, but the essential restriction is, I think, that there shall be no borrowing without the consent of the Governor-General in Council. Section 5 of the same Act of 1926 requires the local
35 authority to submit an application and statement giving information and particulars. Section 6 confers upon the Loans Board in respect of every such application a power (a) to sanction the application wholly or in part, and unconditionally or subject to terms and conditions; or (b) to require the applicant local authority
40 to divide the loan proposal into constituent items so that the rate-payers may vote separately on each item; or (c) to refer the

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application back to the applicant local authority for modification or amendment; or (d) to decline to sanction the proposed loan. By s. 6 (2) the Loans Board is required to notify its decision to the applicant local authority. Section 7 provides that, in the event of the Board declining to sanction the application, no further application shall be made to the Board for its sanction in respect of the same loan proposal within a period of twelve months from the date of the Board's decision, unless in the meantime there has been a material change of circumstances affecting the loan proposals.

The Loans Board is a statutory body and, in my opinion, once it has finally dealt with an application—for example, by declining its sanction—it is *functus officio* in respect of that application and, by reason of s. 7 of the Act, it cannot deal with a further application for its sanction in respect of the same loan proposals within a period of twelve months from the date of the Board's decision unless there has been a material change of circumstances affecting the loan proposals.

Now what the Loans Board did, in the present case, was to reconsider the original application and, though *functus officio*, to decide to grant it. It is plain that, if the Board's decision were the only authority for the loan, it would be bad. But, in my opinion, later legislation has superimposed on the legislation of 1926 a new and independent criterion for testing the validity of a local authority's right to borrow, but the new position may be followed from s. 10 of the Act of 1926. The Loans Board is to notify the Minister of Finance of its sanction. He submits a recommendation to the Governor-General "for his consent to the "raising of the loan." These words are important. The Governor-General's consent is not to "the sanction" of the Loans Board, but "to the raising of the loan" upon a recommendation from the Minister of Finance. The action of the Minister of Finance thus constitutes a new starting-point in the procedure. It is true that s. 3 of the Act of 1926 provides that the Governor-General's consent shall be given "after compliance with the provisions of this Act," but I think that the effect of the later legislation (being s. 11 of the Act, as enacted by s. 29 of the Finance Act, 1932) is to make it clear that this requirement is directory, not mandatory, and that the breach of it does not entail any invalidity in the Governor-General's "consent." Section 11 of the Act (as enacted in 1932) is as follows:—

11. (1) The Governor-General in Council, in giving his consent to the raising of moneys by the local authority, may, notwithstanding anything contained in any authority given by ratepayers or in any special order or resolution of the local authority, determine—

- (a) The time at which such moneys may be borrowed ;
- (b) The term for which they may be borrowed ;
- (c) The rate of interest that may be paid in respect thereof ;
- (d) The provisions for repayment thereof ; and

5 (e) Any other matters in connection with the borrowing and repayment of such moneys,—

and may at any time and from time to time in like manner vary or modify in such manner and to such extent as he thinks fit, or cancel or add to any such determination :

10 Provided that nothing in any such variation, modification, or cancellation of or addition to any such determination shall in any way affect the security of the lenders of any moneys theretofore borrowed.

(2) It shall not be lawful for the local authority to borrow such moneys save in accordance with such consent and determinations, or, as the case may be, such determinations as varied or modified or added to as aforesaid.

15 (3) The consent of the Governor-General in Council as aforesaid shall for all purposes be conclusive proof of the right of the local authority to borrow in accordance with the determinations set forth therein, or, as the case may be, of such determinations as varied or modified or added to as aforesaid.

20 (4) Nothing in any provision of the Local Bodies' Loans Act, 1926, or any other Act relating to rates of interest at which local authorities within the meaning of this Act may borrow moneys, or to the term for which such moneys may be borrowed, or prescribing the manner and conditions of repayment thereof, and nothing in section one hundred and fourteen or section 25 one hundred and fifteen of the said Local Bodies' Loans Act, 1926, shall have any application to the borrowing of any moneys where such borrowing is subject to the provisions of this Act.

The object of s. 11 is, I think, twofold—first, to give the Governor-General the final power to determine whether the loan shall be raised by the local authority or not, and, if so, upon what terms ; and, secondly, to protect lenders by enabling them to rely upon the Order in Council. It is true that the determinations of the Governor-General in Council are made “in giving his
30 “consent to the raising of moneys by the local authority,” and
35 that these determinations relate to the matters set out in paras.

(a) to (e) inclusive of subs. 1 of s. 11 which do not refer specifically to the amount of the moneys to be borrowed. But the object of s. 11 is so plainly to make the Governor-General in Council the final arbiter on the question of the raising of the loan and to protect
40 lenders, that I think absurdity is avoided by construing “the
“consent” of the Governor-General in Council as a document which is not, in its legal nature, dependent upon the validity of preceding acts by the local authority or the Loans Board. From the point of view of lenders and of the Court it is for the Governor-
45 General in Council to obey the directory provisions of the Act and to see that the local authority and the Loans Board have complied with the Act. If the Governor-General errs upon these matters, then his error does not invalidate the Order in Council. In the result, the consent of the Governor-General becomes, of
50 itself, as is stated in subs. 3, conclusive proof of the right of the local authority to borrow in accordance with the determinations set

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forth therein; and I think that this includes the amount of the loan to which the Governor-General consents. Any other interpretation places an intolerable burden on lenders who are unable to scan the minutes of the local authority or of the Loans Board to ascertain whether everything has been done in order. The efforts of the plaintiff in this case to obtain discovery show how perilous would be the position of a lender if he could not rely on the Order in Council as sufficient authority in any Court for the raising of the loan and of its terms.

The question whether s. 11 overrides the requirement of s. 31 (3) of the Fire Brigades Act, 1926—namely, that a Fire Board shall not borrow except with the consent in writing of the Minister—was not in issue on the facts before me. But for the purposes of construction I am forced to the conclusion that the later legislation must prevail. If the Governor-General in Council has assumed that the Minister has consented when he has not, an unlikely position, then the Minister's consent is not "conclusive proof" of the right to borrow, whereas the Governor-General's consent does attain that standard. Accordingly, when the Governor-General's consent is produced in Court, my opinion is that the Court must regard it as conclusive of the local authority's right to borrow and that the Court cannot go behind that consent. This view is supported by the way in which Orders in Council under s. 11 are treated as the only relevant authority for the borrowing of money by a local authority by s. 9 of the Local Authorities' Interest Reduction and Loans Conversion Amendment Act, 1934.

The conclusion to which I have come renders it unnecessary for me to consider in detail the various grounds which were ably urged by Mr. *Burnard* and Mr. *Iles* in support of the plaintiff's case. The motion must be dismissed.

On the question of costs, I think that the litigation has been brought about by mistakes made both by the Fire Board and by the Loans Board, and that, on principle, I am justified, in a case in which the legislation in question has had to be construed for the first time, in ordering the several parties to pay their own costs. Order accordingly.

Motion dismissed.

Solicitor for the plaintiff: *D. W. Iles* (Gisborne).

Solicitors for the Gisborne Fire Board: *Blair and Parker* (Gisborne).

Solicitor for the other defendants, the Local Government Loans Board: *F. W. Nolan* (Gisborne).

WAIROA ELECTRIC-POWER BOARD v. WAIROA BOROUGH.

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Electric-power Board—No Contract by a Municipal Corporation to pay Price fixed by Board for Electricity supplied—Monopoly of Supply of a Commodity of Prime Necessity—Implied Condition that Terms of Supply should be fair and reasonable—Electric-power Boards Act, 1925, s. 82 (n) and (o)—Municipal Corporations Act, 1933, s. 154—Wairoa Electric-power Board License, 1922 New Zealand Gazette, 2689.

The contract between the Board and the municipal Corporation having terminated and the parties being unable to come to terms, the Board wrote a letter to the Corporation the effect of which was that, if the Corporation continued to take electricity from the Board, the latter would charge at the same rate as the Corporation formerly agreed to pay under the contract. The Corporation, after a formal acknowledgment, did not reply further, but continued to receive a supply of electricity from the Board for three months, and then objected to the account rendered on the ground that the price was not fair and reasonable.

The Board, which purchased the whole of its supply of electricity from the Crown, had in its agreement with the latter the following clauses :—

“ 21. The Minister reserves the right to supply electrical energy “ to any Government Department or other public body or local “ authority within the electric-power district or outer area, or to “ any other consumer or local authority within those areas whose “ demand exceeds fifty-horse power of connected load.

“ 21 (a). Provided the Board is prepared to take from the “ Minister the whole of the energy required to supply their load, the “ Minister will not supply any such other consumer in clause 21 “ unless the charges which the Board proposes to make, or the con- “ ditions which it proposes to enforce, are, in the opinion of the Minister, “ unreasonable.”

The Board took from the Minister of Public Works the whole of the energy required to supply their load, and the Minister of Public Works thought the charges the Board was making were reasonable.

In an action to recover the amount alleged to be due to the Board for electrical energy supplied to March 31, 1936,

Held, 1. That s. 154 of the Municipal Corporations Act, 1933, restricted the contracting power of a municipal Corporation in such a way that the borough could not be held to have bound itself to pay the price asked by the Board merely by using the commodity supplied.

Reynolds v. Nelson Harbour Board(1) and *Young v. Mayor and Corporation of Royal Leamington Spa*(2) applied.

2. That the Board, being prepared to take from the Minister the whole of the energy required to supply their load and the Minister considering its charges reasonable, had a practical monopoly of a supply of a commodity of prime necessity—electrical energy.

(1) (1904) 23 N.Z.L.R. 965.

(2) (1888) 8 App. Cas. 517.

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3. That, as there was nothing inconsistent in the statute and license under which it derived its authority to supply, it was an implied condition of its authority that the terms on which it supplied should be fair and reasonable and the matter was not concluded by the opinion of the Minister.

Minister of Justice for Dominion of Canada v. City of Levis(3);
State Advances Superintendent v. Auckland City Corporation(4); and *Lee v. Horowhenua Electric-power Board*(5) applied.

(3) [1919] A.C. 505.

(5) [1934] N.Z.L.R. s. 125.

(4) [1932] N.Z.L.R. 1709.

ACTION to recover the sum of £557 18s. 1d. together with interest, being the balance alleged to be due for electrical energy supplied from December 31, 1935, to March 31, 1936.

The plaintiff was an Electric-power Board first constituted under the Electric-power Boards Act, 1918, and later under the Electric-power Boards Act, 1925. The defendant was a municipal Corporation under the Municipal Corporations Act, 1933. The Board did not generate its own electrical energy, but purchased it from the Crown which owned large generating-works near Lake Waikaremoana. For many years the Board supplied electrical energy in bulk to the Corporation, which again supplied it to the inhabitants of the borough.

In November, 1931, a contract was entered into between the parties that the Board should continue to supply the Corporation with electrical energy at stated prices for a period of three years from January 1, 1931, and thereafter until the contract should be terminated by three months' notice, to be given by either party. That contract continued in operation until December 31, 1935. On September 30, 1935, the Corporation, in pursuance of the contract, gave to the Board three months' written notice of its intention to terminate the contract. The correspondence disclosed that the Corporation was dissatisfied with the price charged, and endeavoured to induce the Board to reduce its price, which the Board refused to do. The Corporation had applied to the Public Works Department for its supply, but without success. The Corporation then requested the Board to supply electricity in bulk for three months commencing on January 1, 1936, at the old contract prices, subject to a condition that the price should be adjusted should an agreement be subsequently entered into for a supply at a different price. The Board offered to supply for three months from the expiry of the contract at the contract price, but refused to agree to the condition asked for. Upon the Corporation again making this request, the Board replied in a letter, dated December 24, 1935, in the following words :—

Referring to your letter of even date, I am directed to inform you that the Board intends to charge for electricity supplied to your Council after the 31st instant at the rate at present charged.

- 5 If the Council desires to disconnect the service, it may do so; but so long as the connection is maintained the Board will expect to receive payment for electric current supplied at the existing rate.

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- This letter was received after the commencement of the legal holidays, and the town clerk replied the same day informing the Board that the borough solicitor was out of town and that its
10 letter would be replied to after the legal vacation. It never was replied to, however, and the Corporation continued to receive a supply of electricity from the Board from January 1 right down to March 31, 1936. They were then charged at the former contract price and an account was rendered for £1,287 13s. 1d. The Cor-
15 poration refused to pay this charge, on the ground that it was not fair and reasonable.

- For the kilo-volt amperes supplied the price charged was exactly the same as the Board was paying the Crown—i.e., for the first 200 K.V.A., £2 10s. per K.V.A. per quarter; and for all
20 over 200 K.V.A., £2 per K.V.A. per quarter. But, in addition, the Board made a charge for the number of units consumed, the charge being $\frac{1}{4}$ d. per unit for the first 600,000 units, $\frac{1}{2}$ d. per unit for the next 300,000 units, and $\frac{1}{16}$ d. per unit for all units in excess of 900,000 units. The license issued to the Board provided that
25 its charges for the wholesale supply of electricity should not exceed £4 per K.V.A. per quarter plus $\frac{1}{2}$ d. per unit, so that the charge made was well within the maximum so fixed: see 1922 *New Zealand Gazette*, 2689.

- The Corporation, however, considered that the charge of
30 £267 2s. 4d. for units supplied was unreasonably excessive, and that the Board was entitled to no more than £30 a year for its services. It therefore deducted the charge for units, added £7 10s. for one quarter's services, calculating the amount due as being £1,028 0s. 9d. From this sum it deducted a further £298 5s. 9d.
35 which it claimed as an overcharge made by the Board on the line to the water-pumping station from July 1, 1926, to January 1, 1934. It sent the Board a cheque for £729 15s., being the balance remaining.

- This action was commenced to recover £557 18s. 1d., the balance
40 of the account. The Corporation has paid into Court the sum of £348 17s. 9d. and £10 8s. for costs; and claims that this sum is sufficient to satisfy the Board's claim. The sum of £348 17s. 9d. is made up of the sum of £298 5s. 9d. deducted from alleged overcharge, that claim being now abandoned by the Corporation, and

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the sum of £50 12s., being 5 per cent. on the charge for kilo-volt amperes supplied. The Corporation apparently acknowledged that the Board was entitled to make this charge in addition to £7 10s. per quarter for its services.

H. B. Lusk and Sainsbury, for the plaintiff.

5

O'Shea, for the defendant.

Cur. adv. vult.

OSTLER, J. [After stating the facts, as above:] The first question for decision is whether upon the facts stated a contract was created between the parties under which the Corporation is bound to pay the charge made by the Board for the supply of electricity for the first quarter of 1936. In my opinion, no such contract was created. The Corporation gave the necessary three months' notice of termination of the existing contract, and both parties, as disclosed by the correspondence, acted on the assumption that the contract would come to an end on December 31, 1935, without any further act on the part of the Corporation. In my opinion, the contract did terminate on December 31, 1935, that being the intention of both parties. The real meaning of the Board's letter of December 24 is :

20

The contract ends on December 31, but if you continue to take electricity from us after that date we shall charge you the same price as you formerly agreed to pay under the contract.

If this had been said to a private consumer, and he had made no reply and had continued to take the supply, the law would have had no difficulty in finding a contract, the receipt and user of the electricity being the acceptance of the Board's offer. But the Corporation is a statutory body with statutory powers, and its powers of contracting have been limited by statute. Section 154 of the Municipal Corporations Act, 1933, restricts the contracting power of a municipal Corporation in such a way that the Corporation cannot be held to have bound itself to pay the price asked by the Board merely by using the commodity supplied. That section is mandatory: *Reynolds v. Nelson Harbour Board*(1) and *Young v. Mayor and Corporation of Royal Leamington Spa*(2). The Corporation, having received and used the electricity, is bound to pay for it, as it admits, but it is not bound by any contract to pay the old contract price.

35

(1) (1904) 23 N.Z.L.R. 965.

(2) (1883) 8 App. Cas. 517.

The next question is, What price is the Corporation bound to pay? In answering that question it has first to be observed that the Board has a practical monopoly of the supply of electrical energy in the district. This is denied by the Board, because of the provisions of two clauses in its agreement with the Crown under which it receives its supply of electricity. Those clauses are as follows :—

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21. The Minister reserves the right to supply electrical energy to any Government Department or other public body or local authority within the electric-power district or outer area, or to any other consumer or local authority within those areas whose demand exceeds fifty-horse power of connected load."

21 (a). Provided the Board is prepared to take from the Minister the whole of the energy required to supply their load, the Minister will not supply any such other consumer in clause 21 unless the charges which the Board proposes to make, or the conditions which it proposes to enforce, are, in the opinion of the Minister, unreasonable.

If cl. 21 had stood alone, I should have been prepared to hold that the Board had no monopoly of supply. There would have been another ample source of supply quite close to the borough. But, by cl. 21 (a), the Crown has contracted away its right of independent supply, so long as the Board is prepared to take the whole of the energy required to supply the load, and so long as the Minister considers that the charges it is making are reasonable. I understood from counsel at the hearing that the Minister does consider that the charge made by the Board to the borough is reasonable, and, that being so, it has no other source of supply, and the Board therefore has a monopoly. Now it has been laid down by the Privy Council and by our Court of Appeal that where a statutory body has a practical monopoly of the supply of a commodity of prime necessity, such as water, it is under a legal liability to supply that commodity at a reasonable price, and even if there is no express provision to that effect in the statute from which it derives its powers, unless there is something inconsistent in its statute, the law implies such a liability: see *Minister of Justice for the Dominion of Canada v. City of Levis*(3) and *State Advances Superintendent v. Auckland City Corporation*(4). These cases both deal with the supply of water, but, in my opinion, the supply of electrical energy is in the same category. It has become a prime necessity in recent years.

I can find no express provision either in the Electric-power Boards Act, 1925, or in the regulations made under it, or under the Public Works Acts, to the effect that an Electric-power Board's charges must be reasonable. Section 82 (n) gives a Board power

(3) [1919] A.C. 505.

(4) [1932] N.Z.L.R. 1709.

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to enter into contracts with local authorities for the supply to them of electric power in bulk. Section 82 (o) gives it power to sell electric energy to any local authority on such terms and conditions as it deems fit. But, in my opinion, that does not mean that a Board has a free hand to make any charge it likes, irrespective of its reasonableness. As I have stated, the Board's license provides for a maximum charge for a bulk supply, and cl. 15 of the regulations published in 1927 *New Zealand Gazette*, 2360, provides that every consumer under similar circumstances must be treated alike. It is true that cl. 14 (a) provides that the charge for electrical energy may be altered from time to time upon one month's notice in writing, provided that the maximum charges stated in the license are not exceeded, but the provision is not necessarily inconsistent with the requirement that the charges shall in every case be fair and reasonable. Mr. Justice *Reed*, after considering the Act and regulations, expressed a clear opinion in *Lee v. Horowhenua Electric-power Board*(5) that the terms upon which a Board was empowered to sell electric energy are required to pass the test of being fair and reasonable, and I respectfully agree with that opinion. As the Board has a monopoly of supply, and as there is nothing necessarily inconsistent in the statute and regulations under which it derives its authority to supply, I hold that it is an implied condition of its authority that the terms on which it supplies shall be fair and reasonable. It follows that, there being no contract by the Corporation to pay the prices fixed by the Board, if the Corporation can prove that the charges are unreasonable it can obtain a reduction to a reasonable amount. It is contended that, as the Minister of Public Works has expressed the opinion that the charges being sued for are reasonable, that ought to conclude the matter. In my opinion, that is not so. The Board has invoked the jurisdiction of the Supreme Court for the recovery of the money it claims from the Corporation. The Corporation has raised the defence that the charges made are unreasonable. It is entitled to have that issue tried in the ordinary way by the calling of evidence before this Court, which must decide the issue on the evidence called before it. The most that can be said for the contention is that, as the charges sued on by the Board have been in existence for some years, that as when the Minister was asked to supply he refused on the ground that the charges were reasonable, and that as the allegation of unreasonableness has been raised by the Corporation, the onus lies on it to prove its contention.

The issue is an exceedingly difficult one for the decision of a Judge who has no knowledge of the scientific or technical aspects of the question. It is eminently a suitable question for arbitration before an expert, and happily both parties have agreed to a submission of the question to arbitration in the event of my holding that it was relevant. I accordingly make an order under s. 15 of the Arbitration Act, 1908, that there be submitted to an arbitrator agreed on by the parties the following questions: (i) Are the charges made by the Board for the supply of electric energy to the Corporation during the first quarter of 1936 fair and reasonable? (ii) If not, what is a fair and reasonable charge for the electric energy so supplied?

This action cannot be disposed of until this issue has been decided. I therefore adjourn this case *sine die* for further consideration, reserving the right to either party to bring it on at any time upon seven days' notice to the other side.

Preliminary questions of law answered accordingly.

Solicitors for the plaintiff: *Sainsbury and Sainsbury* (Gisborne).

Solicitor for the defendant: *J. O'Shea* (Wellington).

McGRATH v. NAPIER BOROUGH.

By-law—Municipal Corporation—Dairy and Milk-supply Control—Repugnancy—Unreasonableness—Municipal Corporations Act, 1933, ss. 364 (32), (33), 367—Health Act, 1920, ss. 20 (e), 67 (a)—Dairy Industry Act, 1908, s. 23—Sale of Food and Drugs Act, 1908, s. 27—Milk Regulations, 1913 New Zealand Gazette, 763.

The following clauses of a by-law made by a borough Council, relating to dairies and the supply of milk, were held invalid:—

Those throwing upon a dairyman the onus not only of inspecting his own cows but of applying to these a test, which is not conclusive as to their being diseased, and of segregating and destroying largely at his own expense such of the cows as do not pass the test.

Those purporting to impose duties upon Government Inspectors of Stock which neither the borough nor any dairyman has power to impose.

Those purporting to give a borough sanitary inspector power to visit a dairy, whether inside the borough or not, condemn any of the dairyman's stock as diseased, and cause it to be destroyed.

Those abrogating the standard for pure milk fixed by the Sale of Food and Drugs Act, 1908, and the regulations made thereunder, and requiring a higher standard than that fixed by the Legislature and than is reasonable.

Clauses were held valid that provided for the keeping of a register by milk vendors of persons from whom they obtained milk for consumption within the borough and giving an authorized officer the right to inspect any dairy which supplied the borough.

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MOTION under s. 12 of the By-laws Act, 1910, for an order quashing certain clauses of a by-law made by the Napier Borough Council, upon the grounds that they were *ultra vires*, repugnant to the existing statute law, and unreasonable. The provisions so attacked were cls. 18, 19 (*a, b, c, and d*), 21 (*b, c, and f*), and cls. 1 to 8 inclusive of Part II of the Schedule of Napier Borough By-law No. 10 (Milk Supplies). The by-law was made on August 18, 1936. The clauses objected to were as follow :—

(18) Wherever by any of the Acts or regulations set forth in the last preceding section provision is made for the doing of any act or thing in dairies, whether within or without the borough, if the milk or cream is supplied from such dairies for the consumption of persons within the borough, in any such case where the act or thing prescribed to be done relates to the inspection of cattle, or the provision of lighting, ventilation, cleansing, drainage, and water-supply, the same shall require to be done to the satisfaction of, or in a manner directed by, the inspector. 10 15

(19) (*a*) From and after the coming into force of this by-law all milk vendors shall keep a full and complete register of the names and addresses of all persons from whom is obtained from day to day milk or cream for the consumption of persons within the borough. 20

(*b*) The omission to keep in a proper and complete manner such register as aforesaid shall constitute a breach of this by-law.

(*c*) Every such register shall at all reasonable times be open to inspection by the inspector and all other officers authorized by the Council in that behalf, and such inspector or other officer as aforesaid shall be at liberty to make extracts therefrom, provided that no such inspector or other officer shall use or permit such information to be used except for the purpose of this by-law. 25

(*d*) The inspector or other officer as aforesaid may at all reasonable times enter, inspect, and examine any dairy, and the lighting, ventilation, cleansing, drainage, and water-supply thereof. 30

(21) (*b*) No person, whether licensed under this by-law or not, shall sell or offer for sale any milk or cream in the borough which does not comply with the standard and conditions set out in the schedule thereto.

(*c*) Every milk vendor shall observe the provisions, conditions, and requirements set out in the said schedule and it shall be a breach of this by-law to sell, or offer for sale, in the borough any milk or cream which is obtained from any herd of cows which does not comply with the conditions and standards set out in the said schedule. 35 40

(*f*) No milk vendor shall bring or allow to be brought on to his dairy any milk or cream produced from the cows of any other person whose herd has not been examined and tested in accordance with the provisions for the examining and testing of herds set out in the schedule hereto. 40

Part II of the Schedule.

(1) Every cow supplying milk in the herd must be examined clinically by an Inspector of the Department of Agriculture at least once annually. Cows showing evidence of disease likely to affect injuriously their milk must be removed from the herd or isolated, and their milk not used for human consumption. 45

(2) Every animal must be tuberculin tested by a Veterinarian of the Department of Agriculture at intervals of not longer than twelve months or within such extended time as may be approved by the Department of Agriculture and by the Council. No animal shall be added to any herd until after it has satisfactorily passed the tuberculin test. 50

(3) To every animal so tested must be applied an identification mark annually in such a manner as is approved by the Department of Agriculture. 55

(4) It shall be an offence for any supplier to keep or allow any milking cow or dairy bull that has not been tuberculin tested and that does not bear an identification mark as set out in cl. 3 hereof to be on pastures of tested herds, except it be satisfactorily isolated until it has been tuberculin tested.

5 (5) It shall be an offence for any licensed vendor or his agent or employee to permit, suffer, or cause to be handled, conveyed, or carried, any milk from cows which have not been tuberculin tested as herein provided.

10 (6) On a herd being tuberculin tested and identified in manner provided in cl. 3 hereof, a certificate shall be issued by the testing veterinarian. This certificate to be produced on demand by the borough sanitary inspector and upon application being made for a vendor's license or an annual renewal of same.

(7) (a) All reactors shall be immediately isolated and disposed of by the producer in such manner as the testing veterinarian directs.

15 (b) Immediately reactors have been removed from the herd, cow-shed, yards, &c., shall be rigorously cleansed and disinfected by the producer as the testing veterinarian shall direct.

(c) If any animals react at the test the herd shall be retested within six months.

20 (8) (a) No supplier or distributor shall advertise milk as from a tuberculin tested herd without first having obtained the permission of the Council.

(b) The herd of any person who shall supply milk to a milk vendor must be tuberculin tested and the certificate produced in accordance with cl. 6 hereof.

25 *Hallett and Morrison*, for the plaintiff.

H. B. Lusk, for the defendant.

Cur. adv. vult.

OSTLER, J. [After setting out the by-law, as above:] This by-law purports to have been made under the authority of the
30 Municipal Corporations Act, 1933, the Health Act, 1920, and the Sale of Food and Drugs Act, 1908. Its object is the praiseworthy one of providing for a supply of pure milk to the inhabitants of the borough.

The first question is whether municipal Councils have been given
35 power to enact such by-laws. Section 364 of the Municipal Corporations Act, 1933, gives a borough Council wide powers to make by-laws for the benefit of its inhabitants—e.g., subs. 8, for conserving public health; subs. 27, for regulating the sale of all articles of human food of a perishable nature; subs. 32, providing that no
40 person shall supply milk in the borough without a license; subs. 33, for the inspection of cattle in dairies, and prescribing and regulating the inspection, lighting, ventilation, cleansing, drainage, and water-supply of dairies and cow-sheds and yards in the occupation of persons following the trade of cow-keepers or dairymen, or used
45 by them in connection with such occupation, whether within or without the borough, if the milk is supplied from such dairies for

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the consumption of persons within the borough. Section 367 (h) provides that a by-law shall not be deemed invalid merely because it deals with a subject dealt with by the general law. That also is provided by s. 12 of the By-laws Act, 1910. In addition, by s. 301, the Governor-General may by Order in Council make such regulations as he thinks fit for the following purposes, such regulations to be either of general application throughout all boroughs or to apply to one or more boroughs only. Then follow seven subsections dealing with the inspection of milk and dairies. It is unnecessary to quote these, but it would seem that they apply only to dairies and cattle within boroughs, and therefore the powers of legislation given to the Governor-General by this section are not as wide as the powers given to a borough by s. 364 (33) already quoted. It is unnecessary, however, to consider the effect of s. 301, because no Order in Council has ever been made under it, and at present it is a dead letter.

The only authority given by the Health Act, 1920, to the defendant Corporation which can be invoked in support of these by-laws is that conferred by ss. 20 (e) and 67 (a) to make by-laws for the protection and conservation of public health.

The Sale of Food and Drugs Act, 1908, confers no authority on a borough Council to make by-laws. Authority is given by s. 27 to the Governor-General to make regulations by Order in Council prescribing, *inter alia*, the standard of quality of any food, and regulations under that Act have been in existence for many years prescribing the standard of quality for milk: see 1913 *New Zealand Gazette*, 763. The standard fixed for milk is

the normal, clean, and fresh secretion obtained by completely emptying the udder of the healthy cow, properly fed and kept, excluding that got during seven days immediately following on parturition.

The clause goes on to fix the minimum percentage of milk solids and butter-fat allowed. It is an offence to sell milk either in a borough or elsewhere which does not comply with the standard so fixed.

It will be seen from what I have said about the three Acts which have been invoked as authority for the making of these by-laws that the widest provision is s. 364 (33) of the Municipal Corporations Act, 1933, and if the by-laws are not within the powers given by this provision they are *ultra vires*. In order to decide this question it is relevant to inquire what statutory provisions (if any) dealing with the same subject-matter were in existence when these by-laws were made. Under the Dairy Industry Act, 1908, and its regulations, elaborate provisions had already been

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- made for the licensing and inspection of dairies and live-stock used in such dairies. It was provided that all Inspectors under the Stock Act, 1908, should be Inspectors under the Act: s. 2. Power was given to Inspectors to enter and inspect any dairy and, *inter alia*, any stock used in connection with a dairy: s. 3. He could condemn any stock as being diseased and order it to be dealt with as diseased stock: s. 6 (*d*) and s. 7 (*c*). The duty of the owner in such a case was to separate such diseased stock from the rest of the herd, and to prevent its milk being sold: s. 9 and s. 13 (*a*).
- 10 Apart from the condemnation of stock it was an offence to sell any milk from a cow which was known or even suspected to be diseased. By s. 23 there was power to make regulations, imposing fines not exceeding £50 for their breach, on a number of subjects, including the inspection of cows and other stock kept upon or
- 15 about a dairy. If an Inspector had condemned any stock as diseased, he might cause it to be destroyed: s. 15 of the Stock Act, 1908. By s. 23 of that Act, every owner of diseased stock or stock suspected of being diseased was under a legal liability to notify an Inspector within twenty-four hours, and to keep such stock
- 20 segregated. If an Inspector ordered diseased stock to be destroyed, the owner must bear the costs of destruction: s. 28. The owner was, however, entitled to some compensation if the diseased cow was not over eight years, but not to a greater extent than half its value: ss. 40 to 42.
- 25 It will thus be seen that by virtue of the provisions of the Dairy Industry Act and the Stock Act, the State, in the interest of public health, had already statutory power to provide for the conditions under which a license to run a dairy business could be acquired, and had done so by elaborate regulations; that it had already
- 30 made it an offence for a dairyman to sell milk from a diseased cow or from a cow suspected of disease; and it had provided for the inspection of dairy herds and the condemnation of diseased cows. Moreover, according to the evidence of Mr. E. E. Elphick, M.R.C.V.S., Chief Inspector in the Hawke's Bay District, the Inspectors had
- 35 for some years established a practice of annually taking a composite sample from the milk of every herd in the district. This sample would be sent to the laboratory of the Agricultural Department, and there centrifuged. A small quantity of the sediment would be injected into a live guinea pig, which would be kept for some six
- 40 weeks and then destroyed. If on microscopic examination its internal organs were found to be completely free of the bacillus of bovine tuberculosis, then it could be confidently pronounced that the sample of milk so tested was free from the germ. Mr.

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Elphick says that all the regular dairy herds around Napier have been submitted annually to this test for some years, and that at the last test every sample of milk, some thirty in all, was found to be free of the germ of bovine tuberculosis.

There is, however, another test used in veterinary practice in order to detect tuberculosis in dairy cows. This is known as the tuberculin test. A prepared serum is injected into the cow, to which in a short time it reacts in a certain way if infected. But the test is not conclusive. As Mr. Elphick says, "there are some animals which, though rotten with the disease, do not react to the test." Moreover, he says, there might (in some cases) "be a strong reaction" and yet it would not be possible to find the germ in the animal "under the microscope." Therefore the test, although no doubt a valuable check, is not a certain indication of the presence or absence of the disease. Moreover, it is common knowledge that in England nearly half the cows used to supply the people with milk will react to the test. In New Zealand it is estimated that about 8 per cent. only of our dairy cows will react. There have been suggestions made from time to time in the Press that the State should provide for the periodical tuberculin testing of all our dairy cows, and the destruction of all reactors, paying full compensation for all losses suffered thereby. As we have nearly two million dairy cows, and such a scheme would result in the destruction of some 150,000 cows, the cost in compensation alone would amount to well over a million pounds, apart from the large cost of testing and destruction. Seeing that, unless a cow actually has tubercular mastitis—i.e., tubercular inflammation of the udder or teats—even if it is a reactor its milk is never found to contain the germs of tuberculosis, and that cases of tubercular mastitis are exceedingly rare in New Zealand, it is at least questionable whether the destruction of some 150,000 reactor cows would be worth the great expense involved. Whether it would is a question for the Government to decide, and so far it has not enacted that all reactors shall be destroyed either with or without compensation. But the by-laws in question provide for the compulsory annual testing of his herd by every dairyman, whether in or out of the borough, who supplies milk to its inhabitants, and the compulsory segregation and destruction of all reactors at the dairyman's expense, subject to the uncertain and, in any case, the inadequate compensation provided for in the Stock Act, 1908.

Did the Legislature, having enacted the Dairy Industry Act, 1908, the Stock Act, 1908, and the Sale of Food and Drugs Act, 1908, intend in enacting s. 364 (33) of the Municipal Corporations Act, 1933,

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to give to borough Councils power to enact such drastic provisions as the by-laws objected to, provisions which interfere with private rights in a way in which the Legislature has never ventured to interfere? I do not think so. The power given to inspect dairy
5 herds used for the supply of milk to the borough inhabitants has existed at any rate ever since 1886; see s. 442, sub-heading, "In respect of public health," cl. (e) of the Municipal Corporations Act, 1886; but in all the intervening years no borough Council
10 has claimed the power which these by-laws claim. I think the right to make by-laws for the inspection of cows carries incidentally the right to make by-laws for prohibiting the supply of milk from cows which upon inspection show signs of disease; for otherwise the right of inspection would be valueless. But these by-laws go
15 far beyond such an incidental power. They throw on the dairyman the onus not only of annually inspecting his own cows, but of applying to them a test which is not conclusive as to their being diseased, and of segregating and destroying largely at his own expense such of the cows as do not pass the test. Moreover
20 cls. 1, 2, 3, 4, 5, 6, 7, and 8 (b) of Part II of the Schedule purport to impose duties upon Government Inspectors of Stock which neither the borough nor any dairyman has power to impose. The onus is thrown on the dairyman of obtaining the services of such an Inspector annually for a clinical examination of his herd. If
25 the Inspector is unwilling or unable to do the work within the stated time, the dairyman cannot compel him; but he is subjected to a penalty for not doing that which is beyond his control. For this reason the clauses mentioned are not only *ultra vires*, but also unreasonable.

I shall now deal seriatim with the clauses of the by-law objected
30 to, indicate those which I think are invalid, and give my reasons for so holding. Clause 18 is, I think, invalid because it is *ultra vires* and repugnant to the statute law. It purports to give a borough sanitary inspector power to visit a dairy, whether inside the borough or not, condemn any of the dairyman's stock as
35 diseased, and cause it to be destroyed. A dairy having been registered under the Dairy Industry Act, 1908, and the dairyman having faithfully complied with all the stringent regulations under that Act to the satisfaction of the Government Inspector of Stock, if this by-law were valid could be made to alter or undo at the
40 demand of the borough inspector all that he had done to the approval of the Inspector of Stock.

With regard to cl. 19, I am not convinced that any valid objection can be taken to it. Subclauses (a), (b), and (c) of that

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clause provide for the keeping of a register by milk vendors of the names and addresses of all persons from whom they obtain from day to day milk or cream for the consumption of persons within the borough. Such register is to be open at all reasonable times to inspection by the inspector and all other officers authorized by the Council. Failure to keep such a register is a breach of the by-law. In the regulating of the milk-supply to its inhabitants, a borough is entitled to know where that milk comes from, and the object of these provisions is to enable it to keep a check on the sources of supply. I see no objection to these clauses, nor to cl. 19 (d) which gives the borough inspector or any other officer authorized by the Council the right at all reasonable times to enter and inspect any dairy which supplies the borough. That provision is well within the powers given by s. 364 (33) of the Municipal Corporations Act, 1933.

Clause 21 (b) and (c) and cls. 1 to 7 (b) inclusive and 8 (b) are the clauses chiefly objected to. No objection was urged against cl. 8 (a). These are the clauses which purport to impose on all dairymen supplying milk to the borough the duty of having their herd tuberculin tested every year. I have already given my reasons for holding that these clauses are invalid. Clause 21 (a) makes it an offence to sell within the borough any milk or cream which does not comply with the regulations under the Sale of Food and Drugs Act, 1908. Those regulations fix a statutory standard for pure milk, and no local authority has the power to abrogate that standard and require a higher one. Not only do the clauses objected to attempt to do this, but cl. 10 of Part II of the schedule provides that milk must not contain at any time before delivery more than 200,000 bacteria per cubic centimetre. It is a well known scientific fact that it is impossible to supply milk free from bacteria, but that in cows which are free from disease these are harmless. Even if milk comes from the cow free from these bacteria, as they are present in the air it is impossible to keep them from entering milk, where they increase with varying rapidity according to the temperature. A supplier might have a disease-free herd and a clean dairy. He might do his milking under the most approved hygienic conditions, and yet be liable to a penalty because through some accident of the weather the harmless bacteria which he could not prevent getting into the milk had multiplied beyond the prescribed quantity. Clause 10 is an attempt to fix a higher standard than that fixed by the Legislature and a higher standard than is reasonable. Clause 10 is not referred to in the motion, but it is a part of the provisions for fixing the

standard of milk referred to in cl. 21 (b) which I have already held to be invalid.

I regret having to declare these by-laws invalid, because, as I have said, their object is praiseworthy. But before they were passed I think it clear from the evidence of Mr. Elphick and the paper read by Mr. C. S. M. Hopkirk, B.V.Sc. (which was put in evidence and of which he approved), that Napier, owing to the work of the Government Stock Department, was already receiving a supply of milk free from the bacteria of bovine tuberculosis, and its inhabitants could drink raw the milk supplied without running the risk of tubercular infection. Moreover, pasteurization of the milk has been found to be a certain method of killing the germs of bovine tuberculosis, and it is always within the power of a borough to provide that no milk shall be sold in the borough unless it has been pasteurized.

There will be an order quashing cls. 18, 20 (b), (c), and (f), and cls. 1, 2, 3, 4, 5, 6, 7, 8 (b), and 10 of part II of the schedule to the by-law. The defendant Corporation must pay the costs of the motion, which I fix at £15 15s., witnesses' expenses, and disbursements.

Order accordingly.

Solicitors for the plaintiff: *Hallett, O'Dowd, and Morrison* (Napier).

Solicitors for the defendants: *Kennedy, Lusk, Morling, and Willis* (Napier).

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PAGE, J.

[IN THE COURT OF ARBITRATION.]

DAWSON v. SOUTHLAND COUNTY.

Workers' Compensation—Liability for Compensation—Worker engaged on Contract as well as in Temporary Work for Wages at Time of his Death—Major Portion of his Income over Period of Years derived from Contracts with County and not from Wages as a Servant—Nature of Widow's Dependency on his Earnings—Workers' Compensation Act, 1922, ss. 4, (2), 5 (5).

The facts that a deceased worker over a period of years derived the major portion of his income from contracts and not from wages as a servant, and that at the moment of his death, in addition to earning his wages, he was earning money as an independent contractor and his wife was not maintained solely from his "earnings," do not prevent his wife from being totally dependent on the earnings of such worker within the meaning of s. 4 (2) of the Workers' Compensation Act, 1922, which, so far as relevant to this question, is as follows:—

"The wife of a deceased worker . . . shall be conclusively
"presumed to have been dependent on the earnings of that worker
""

Pryce v. Penrikyber Navigation Colliery Co., Ltd.(1), distinguished.

(1) [1902] 1 K.B. 221; 4 W.C.C. 115.

ACTION brought by the widow of one John Dawson claiming compensation in respect of the death of her husband.

Two main grounds of defence raised were (i) that deceased was not a "worker" within the meaning of the Workers' Compensation Act, 1922, and (ii) that the widow was a partial 5
dependant only and not a total dependant, and that, if she were entitled to any compensation, it should not be for more than a nominal amount.

The evidence showed that Dawson, who was a gravel and cartage contractor and had done much work for the defendant 10
county, in January, 1935, approached the county Councillor for his riding and asked to be given some temporary work.

An arrangement was made whereby he was put on to work in a county gravel-pit at a wage of 11s. 6d. a day, and his lorry, driven by his son, was engaged to work along with two county 15
lorries in the cartage of the gravel, the rate payable by the county for the lorry and driver being 7d. per yard-mile of gravel moved.

H. E. Russell, for the plaintiff.

H. J. Macalister, for the defendants.

Cur. adv. vult.

The judgment of the Court was delivered by

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PAGE, J. In the case of *Performing Rights Society, Ltd. v. Mitchell and Booker (Palais de Danse), Ltd.*(1), McCardie, J., discussing the tests to be employed in deciding whether the relationship of master and servant or principal and independent contractor exists in any given case, says: "The nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances under which payment of the reward may be withheld, all these bear on the solution of the question . . . It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is, of course, one only of several to be considered, but it is usually of vital importance"(2).

We do not propose to set out in detail the conditions of Dawson's employment. We entertain no doubt on the facts that judged by the tests above outlined he was a servant in the employ of the defendant county, and that he was thus a worker within the meaning of the above Act.

With regard to the question of dependency, it is shown that his widow is without any means whatever, and that during his life she was totally dependent and solely on him for her support and maintenance.

Dawson left no assets. It is contended, however, that as over a period of years the major portion of his income arose from contracts entered into with the defendant county and not from wages as a servant the plaintiff's dependency on the earnings of her husband was thus partial and not total.

Alternatively, it is contended that if at the moment of death the deceased, in addition to earning wages, was earning money as an independent contractor, his widow was not totally dependent on his "earnings" as a servant, but was in part being kept by his earnings as an independent contractor, and that therefore she was not a total dependant within the meaning of s. 4 (2).

The effect of this doctrine would mean that in every case where a widow was claiming compensation there would have to be an inquiry not only into the average weekly earnings of the deceased as a servant of the person in whose employ he was killed, but also an inquiry into his income from other sources, and if it were found that he had income from other sources and that his wife

(1) [1924] 1 K.B. 762.

(2) *Ibid.*, 767.

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were supported from the common fund she would, though in fact totally dependent on him, have to be declared a partial dependant only, and there would have to be an inquiry as to the extent to which the earnings of deceased as a servant formed part of such fund.

5

In a case where a worker having an income from sources other than his earnings as a servant chose, for reasons of his own, to maintain his wife solely from such other income, that fact, according to this doctrine, would totally defeat her right to any compensation though she may have been in fact totally dependent on her husband for maintenance.

10

No case has been cited which supports such doctrine. Reliance was, however, placed by counsel for defendant on certain dicta of *Henn-Collins*, M.R., in *Pryce v. Penrikyber Navigation Colliery Co., Ltd.* (3). It is true that certain dicta of the Master of the Rolls there, if read literally, would seem to give some colour to this proposition of defendant, but the case itself merely decided that money by way of legacy that came to the dependants of a deceased worker on his death was not to be taken into consideration in deciding the question whether they were wholly dependent on deceased at the time of his death.

15

20

The doctrine is, moreover, opposed to the principle under which, by our Act, the compensation of an injured worker is to be assessed. By s. 5 (5) of the Act it is provided that during any period of total incapacity the weekly payment shall be an amount equal to sixty-six and two-thirds per centum of the worker's average weekly earnings at the time of the accident.

25

"Average weekly earnings" means the average weekly earnings received by a worker while at work during the previous twelve months for that employer.

30

It has never been suggested that a worker who may have a small income from other sources would receive less compensation than one who has not.

Counsel presumably contends that the words in s. 4 (2), "the wife of a deceased worker . . . shall be conclusively presumed to have been dependent on the earnings of that worker . . .," mean the earnings as a servant only and not his earnings generally.

35

It is to be noted that the word "earnings" is not defined in the Act.

40

In our opinion, the evidence discloses that the plaintiff was totally dependent on the earnings of the deceased within the meaning of subs. 2 of s. 4 of the Act.

She is, therefore, entitled to a sum of two hundred and eight times his average weekly earnings. These have been agreed on at £3 9s.—six days at 11s. 6d.—and judgment must be entered for plaintiff for £717 12s., plus funeral and medical expenses, 5 £31 13s., with costs, £15 15s., and witnesses' expenses to be fixed by the Clerk of Awards.

Judgment for plaintiff.

Solicitors for the plaintiff: *Russell, Son, and Meredith* (Invercargill).

Solicitors for the defendants: *Macalister Bros.* (Invercargill).

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MOUTOA DRAINAGE BOARD v. EASTON AND OTHERS.

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REED, J.

Land Drainage—Right of Board to order removal by Occupier of Obstructions in Drain under its Management—Notice to remove Trees or Portions of Trees lodged in Drain without Specific Reference to Obstructions—Whether valid—Procedure to recover Cost of Work done by Board consequent on Failure of Occupier to comply with Order—Land Drainage Act, 1908, ss. 25, 62—Land Drainage Amendment Act, 1913, s. 7—Finance Act, 1933 (No. 2), s. 47.

A Land Drainage Board has power to order an occupier of land on the banks of a drain vested in or under the management of the Board to remove obstructions from it, the decision in *Thompson v. Wakapuaka Drainage Board*(1) having been abrogated by s. 47 of the Finance Act, 1933 (No. 2).

A notice by such a Board under the provisions of s. 62 of the Land Drainage Act, 1908, and its amendments, ordering such an occupier to remove from such a drain "all trees or portions of trees which, as the result of recent winds, or other causes, have become lodged in or across" the said drain, is not invalid because it does not specifically require the removal only of such trees or portions of trees as are creating an obstruction.

When the occupier fails to comply with the order, and the Board causes the necessary work to be done, the Board is not compelled to prosecute upon failure to comply with the order; but it is by virtue of s. 62 (2) of the Land Drainage Act, 1908, in the position of a rating authority which has taken the necessary steps under the Rating Act, 1925, and it may recover the cost of the work as a debt in any Court of competent jurisdiction.

(1) [1929] N.Z.L.R. 548.

APPEAL from a decision of the Magistrates' Court at Foxton.

The appellant served an order, under s. 62 of the Land Drainage Act, 1908, as amended by the Land Drainage Amendment Act, 1913, upon the respondents to clear certain obstructions in drains running through their property. Such notice was as follows:—

Under the provisions of s. 62 of the Land Drainage Act, 1908, and its amendments, you are hereby ordered to remove from Leen's drain and from the diagonal drain, where such drains run through your property, all trees or portions of trees which, as the result of recent winds, or other causes, have become lodged in or across these drains.

The respondents failed to comply with the order and the appellant did the necessary work and sued for the cost.

Two defences were raised, as follows:—

1. That the notice of February 28, 1936, was bad on its face, and invalid, in that it was ambiguous and too general in its terms, and further, that it purported to order the defendants to do something which the plaintiff Board was not empowered to order.

2. That a Land Drainage Board had no power to order an occupier to remove obstructions from drains vested in or under the management of the Board.

The learned Magistrate found in favour of the appellant on 5 each of these defences, but gave judgment for the respondents on a ground taken by himself—that is to say, that the appellant had not adopted the correct procedure to recover the cost of carrying out the work. The appeal was against that decision.

The following facts were found by the learned Magistrate :—
10 The plaintiff was a Drainage Board duly constituted under the Land Drainage Act, 1908, and its amendments. The defendants were the executors of J. Stevens, deceased, trading as “Stevens and Easton,” of Moutoa, farmers, and the lands
15 farmed by them were within the drainage district of the said Board. Through the lands farmed by the defendants run certain drains, including a drain known as “Leen’s drain,” and another known as the “diagonal drain.” There were a very large number
20 of willow trees on defendants’ property on both sides of the diagonal drain, and a considerable number of willow trees on both sides of Leen’s drain on defendants’ property. In February
last, following upon a cyclone and a flood in the Moutoa Drainage District, these drains were found to be obstructed in different
places, some willow trees having been blown down into the drain,
and these and broken branches forming obstructions. There
25 were also some blockages caused by willow trees which had been cut down by the defendants on their property, and which they had endeavoured to burn.

Baldwin, for the appellant Board.

30

Bergin, for the respondents.

Cur. adv. vult.

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35 REED, J. Counsel for the respondents supports the decision of the learned Magistrate and also attacks the judgment on the points decided against him.

[His Honour then set out the statement of facts, as above, taken from the Magistrate’s judgment, and proceeded:] I may add to this that the drains were not constructed by the appellant
40 Board but were, nevertheless, under its control and management.

5
The most important question involved in this case is the second ground raised by the respondent—that is to say, whether a Land Drainage Board has power to order an occupier to remove

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obstructions from drains vested in or under the management of the Board. I propose to consider that question first. Were it not for the provisions of s. 47 of the Finance Act, 1933 (No. 2), the question would be concluded by the decision of the Court of Appeal in *Thompson v. Wakaupaka Drainage Board*(1). In that case the Court had to endeavour to reconcile the provisions of s. 25 of the Land Drainage Act, 1908, with s. 7 of the Amendment Act of 1913. Under the former section the duty of keeping all drains vested in a Drainage Board or under its management cleared, cleansed, and maintained in proper order was cast upon the Board, and it was liable to any owner of land for damage done in consequence of the disrepair of such drain. By s. 7 of the Amendment Act of 1913 the Board was empowered to compel the occupier of land through which a drain passed to remove at his own expense all obstructions in the drain calculated to impede the free flow of water in such drain. The Court of Appeal held these sections to be irreconcilable, and it resolved the difficulty by holding that s. 7 had no application to drains vested in and under the management of the Board. The drains in the present case being vested in and under the management of the Board, if the decision in that case is good law to-day the appellant was not entitled to require the respondents to do the work ordered and cannot recover the cost. The Legislature, however, has repealed s. 25, and, in substitution, has enacted s. 47 of the Finance Act, 1933 (No. 2), the provisions of which are as follows :—

(1) Every Drainage Board shall cause all watercourses or drains from time to time vested in it or under its management to be constructed and kept so as not to be a nuisance or injurious to health, and to be properly cleared and cleansed and maintained in proper order :

Provided that nothing in this subsection shall prohibit the Board from exercising the powers conferred on it by section sixty-two of the Land Drainage Act, 1908, as amended by section seven of the Land Drainage Amendment Act, 1913.

(2) Where, in the case of any drain actually constructed by it, the Board fails to comply with the requirements of the last preceding subsection, it shall be liable to the owners or occupiers of any land for damage done thereto in consequence of or through the disrepair of such drain.

(3) This section is in substitution for section twenty-five of the Land Drainage Act, 1908, and that section is hereby accordingly repealed.

By this section there is placed upon a Drainage Board a general responsibility to "cause" all drains vested in it or under its control to be properly cleared and cleansed and maintained in proper order. To effect that purpose it is empowered by s. 7 of the Act of 1913, *inter alia*, to order the occupier of land through which a drain passes to remove all obstructions to the free flow

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of water in such drain and, on his failure to do so, to recover the cost of doing it. It is to be observed, although it does not affect this case, that under the repealed s. 25 the Board was responsible in damages for not carrying out the requirements of that section, but by subs. 2 of s. 47 of the Finance Act its liability in that respect is limited to failure in the case of drains "actually constructed by it." The section of the Finance Act was clearly enacted for the purpose of abrogating the decision in the *Wakapuaka* case(2). I hold that the appellant Board had power to order the respondents to remove obstructions from the drains upon their place.

The next question is as to whether the notice sent by the appellant to the respondents is valid. It is in the following terms :—

15
Messrs. Stevens and Easton,
P.O. Box 37,
Foxton.
Foxton, N.Z.,
February 28, 1936.

20 DEAR SIRS,—

Under the provisions of s. 62 of the Land Drainage Act, 1908, and its amendments, you are hereby ordered to remove from Leen's drain and from the diagonal drain, where such drains run through your property, all trees or portions of trees which, as the result of recent winds, or other causes, have become lodged in or across these drains.

For the Moutoa Drainage Board—
(Sgd.) G. V. FRASER,
Clerk to Board.

No form of notice is prescribed by the Act, but by s. 62, as amended by s. 7 of the Act of 1913, when in the opinion of the Board an obstruction to a drain is likely to cause damage to property, the Board may order the occupier of any land on the banks of the drain to remove from the drain

all obstructions of any kind calculated to impede the free flow of water in such . . . drain. "Obstructions" includes earth, stone, timber, and material of all kinds, and trees, plants, weeds, and growths of all kinds."

Mr. *Bergin* for the respondents contends that the notice is invalid upon the ground that there is no power to order the removal of parts of trees, *qua* trees, but only such as are an obstruction. He relies on *Grey v. Thomson*(3). In that case Mr. Justice *Sim* held to be invalid a notice given by a municipal Corporation to a property owner to "lower the trees growing on your property . . . to a height not exceeding 15 ft. from the ground." The power conferred by s. 6 of the Municipal Corporations Act, 1908 (the Act then in force), in connection with trees and hedges,

(2) [1929] N.Z.L.R. 548.

(3) [1917] N.Z.L.R. 926.

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is limited to trees and hedges which overhang or overshadow any street in a borough. His Honour held that the order was bad because it did not so limit the trees and hedges, but applied to all trees on the property. Mr. *Bergin* contends that the order in the present case should have specifically required the removal only of such trees or portions of trees as are creating an obstruction. It would be impracticable to describe each tree or part of a tree that is creating an obstruction, and the only alternative would be for the order to read "all trees or portions of trees which are "creating an obstruction," leaving it to the respondent to decide how much clearing of the drains should be done. The opinion of the Drainage Board is, under the statute, the deciding factor, subject to appeal, as to whether an obstruction exists or not, and it has decided that "all trees or portions of trees, which as "the result of recent winds, or other causes, have become lodged "in or across these drains" are obstructing the drains, and, in accordance with the specific authority conferred by the Act, their removal has been ordered. The order, in my opinion, is valid. The respondent did not exercise his statutory right of appeal against the order, but, on the contrary, refused in writing to carry it out. After expiry of the statutory time within which the order should have been complied with the appellant caused the necessary work to be done, and, in the present proceedings, sued for the costs, £23 3s. 6d. And here the learned Magistrate is of opinion that the procedure adopted by the appellant was in fault.

Subsection 2 of s. 62 is as follows :—

(2) Every occupier or owner who fails to comply with such order within fourteen days from the receipt thereof is liable to a fine not exceeding one pound for every day during which such order is not obeyed, and a further sum equal to the cost incurred by the local authority in removing any such obstruction; and the said cost shall be a charge on the land, and may be recovered as rates are recovered under any Act for the time being in force in the district :

Provided that any such occupier or owner may appeal to a Magistrate against such order within ten days after the service thereof, and such Magistrate shall have jurisdiction to determine whether such order shall have effect, having regard to all the circumstances of the case, and pending the determination of such appeal the order shall be suspended.

It is remarkable how varied is the procedure prescribed elsewhere in the statute in respect of the recovery of similar costs and expenses incurred by a Board. Under s. 23 the Board may make drains from private lands and the cost

may be sued for and recovered as a debt due to the Board in any Court of competent jurisdiction.

Section 26, after providing that a person who, *inter alia*, makes any branch drain into a drain vested in the Board is liable to a

fine not exceeding thirty pounds, authorizes the Board to remake the branch drain, and the expenses

may be recovered before any Justice in a summary way.

Section 27 provides that, in default of compliance by an occupier with an order to remove a tree threatening a drain, the Board may do the work and

may recover the cost of such removal from the occupier.

Section 50 empowers a Board to make by-laws which, *inter alia*, may prescribe the method of the "recovery of the cost thereof"

of work done by the Board on drains passing through private property where the owner or occupier makes default in compliance with an order of the Board. There is then the procedure now under consideration under s. 62 (2). I am unable to see why there should not be enacted a simple procedure applicable throughout. The subsection presents difficulties.

Applying the principle that where no liability exists at common law recovery of a statutory liability must be in accordance with the procedure laid down in the statute creating the liability, his Worship interprets the section as requiring that, before any liability arises following the non-compliance with the order, the occupier must be prosecuted to conviction. He regards the provision in s. 62 (2) that "the cost shall be a charge on the land," as necessitating a procedure by which the Drainage Board must prosecute and, at the hearing of the information, the cost of removing the obstruction must be ascertained and fixed by the Court, and that amount then becoming a charge on the land is a statutory debt recoverable as a rate.

The procedure suggested is complicated. To ascertain the cost, before the work is done, of clearing numerous small and big obstructions, would be difficult of calculation; but that which militates most strongly against the suggested procedure is that there is no machinery provided. To enforce the penalty is a quasi-criminal proceeding, the jurisdiction of the Court being confined to fixing the amount thereof. There is no jurisdiction conferred to ascertain and fix the cost of the work before it has been done, and such a jurisdiction cannot be implied. I cannot agree that this procedure is indicated. When the Drainage Board calls upon an occupier to remove obstructions, he has the opportunity of doing the work himself. If he disregards the order, the Board is empowered to do the work, and the cost becomes at once a charge upon the land, and recoverable as provided by the statute. I admit that the section is not by any means clear, but I think it will bear a construction that will cause

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least inconvenience in its administration. I think the correct procedure is as follows: On the order being served upon the occupier of the land, he may appeal to a Magistrate, and upon that appeal the Magistrate decides whether or not such order shall have effect. If the occupier does not appeal, or, if on appeal, the Magistrate decides that the order shall have effect and the occupier fails to comply with such order within fourteen days, the Drainage Board may prosecute the occupier, and the only issue before the Court, hearing such prosecution, will be whether or not the failure to comply with the order is proved. If proved, that Court adjudges the penalty. But the Drainage Board is not compelled to prosecute upon failure to comply with the order, the section is not mandatory, the Board may, as in the present case, do the necessary work and recover the cost. The method of recovery is prescribed as being "as rates are recovered under any Act for the time being in force in the district." The Rating Act, 1925, is the Act in force in the district, and must be read *mutatis mutandis*. By s. 65 (1) it is provided:

If any person fails, for fourteen days after demand thereof, to pay any rate for which he is liable, the local authority may recover the same as a debt in any Court of competent jurisdiction.

All the necessary preliminary steps having been taken to entitle the Drainage Board to recover the cost, it is in the position of a rating authority which has taken the necessary steps under the Rating Act, and the same may be recovered "as a debt in any Court of competent jurisdiction."

The appellant having adopted that procedure in the present case, I think the appeal must be allowed. As the respondents do not dispute that the amount claimed by the appellant Board was the cost to the Board of removing the obstructions, the matter may be disposed of as provided by s. 168 of the Magistrates' Courts Act, 1928.

The appeal will be allowed with costs in this Court of £7 7s. and disbursements, and judgment shall be entered in the Magistrates' Court at Foxton for the appellant Board for the sum of £23 3s. 6d., with costs and disbursements to be ascertained by the Clerk of that Court.

Appeal allowed.

Solicitor for the appellant Board: L. G. H. Sinclair
(Palmerston North).

Solicitors for the respondents: Moore and Bergin (Foxton).

[IN THE SUPREME COURT.]

GRICE *v.* THE KING.

Deaths by Accidents Compensation—Dangerous Occupation—Deceased engaged in Quarrying with Explosives—No Negligence alleged—Whether Employer liable for Damages—Volenti non fit injuria.

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CHURCH.

1937.

May 14,
July 20.

NORTH-
CROFT, J.

Where a person is engaged to perform a dangerous occupation—*e.g.*, quarrying with explosives—and undertakes to do work that is intrinsically dangerous, and care has been taken to render it as little dangerous as possible, he voluntarily subjects himself to the risk; and those claiming through him cannot be permitted to complain that a wrong had been done when he was killed as the result of engaging in such occupation.

Smith v. Charles Baker and Sons(1) followed.

Attorney-General v. Cory Bros. and Co., Ltd.(2), mentioned.

Rylands v. Fletcher(3) and *Miles v. Forest Rock Granite Co. (Leicestershire), Ltd.*(4), distinguished.

(1) [1891] A.C. 325.

(2) [1921] 1 A.C. 521.

(3) (1866) L.R. 1 Ex. 265; aff. on app.

(1868) L.R. 3 H.L. 330.

(4) (1918) 34 T.L.R. 500.

PETITION OF RIGHT wherein the suppliant sought damages for herself and her children for the death of her husband.

By arrangement a case was stated for the determination of a question of law. The case stated set out the facts agreed upon, 5 by which the suppliant and the respondent agreed to be bound as if such facts had been given in evidence and proved at the trial and found as facts by the Court or Judge trying the petition. These facts were as follow :—

Robert Grice, a labourer, was one of a gang of men employed 10 by the Public Works Department in or about the Summit Road quarry near Christchurch. On Wednesday, February 3, 1937, Robert Grice was fatally injured by accident under the following circumstances : (a) A series of charges were exploded in the said quarry—six of gelignite and seven of lyddite ; (b) the men employed 15 in the quarry, in accordance with established usage, took shelter at what was considered a safe distance during the said explosions ; and (c) when he had taken shelter as aforesaid as usual at a reasonably safe distance from the site of explosion, the said Robert Grice was struck by a piece of flying rock and fatally injured as afore- 20 said.

Though the Crown is not bound by the Stone-quarries Act, 1910, work in the said quarry was carried out in accordance there-

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with, and on the occasion of the said accident the usual and proper precautions were observed.

The following question was submitted to the Court for determination :—

Was the Crown under the circumstances under an absolute duty to prevent accident ?

P. J. O'Regan, for the suppliant.

A. Brown, for the respondent.

Cur. adv. vult.

NORTHCROFT, J. For the suppliant it is claimed that the respondent is bound by the rule in *Rylands v. Fletcher*(1), and that there is a liability to anyone at all who may be injured, whether voluntarily or involuntarily, as a result of the use of explosives without negligence. The respondent, on the other hand, contends that *Rylands v. Fletcher* does not apply in favour of one who voluntarily incurs the risk known to be present ; in other words, that the doctrine of *volenti non fit injuria* is to be applied together with the rule in *Rylands v. Fletcher*. In my view, the latter submission is correct. Were it otherwise, all servants injured at hazardous occupations would be entitled to damages at common law for such injuries without proof of negligence. This is a result so novel, startling, and far-reaching as to be acceptable only upon the clearest authority. No such authority was referred to in the argument before me, nor, having given the utmost consideration to the submissions, have I been able to discover any justification for such a view. The case of *Miles v. Forest Rock Granite Co. (Leicestershire), Ltd.*(2), was strongly relied on for the suppliant. It is quite true that it was there held that *Rylands v. Fletcher* applied to the use of explosives in a quarry, and that a person injured while proceeding along an adjacent roadway was entitled to succeed independently of any question of negligence. At the same time, in that case there was no room for the doctrine of *volenti non fit injuria*, nor was it under consideration. For the purposes of the decision the person was regarded as a person involuntarily injured by the defendants, who were bound to keep the results of the explosion on their own ground and to accept responsibility for its escape. If I understand it aright, the effect of the proposition for the suppliant is to deny altogether the doctrine of *volenti non fit*

(1) (1866) L.R. 1 Ex. 265 ; aff. on (2) (1918) 34 T.L.R. 500.
app. (1868) L.R. 3 H.L. 330.

injuria. That rule is discussed by Lord *Herschell* in *Smith v. Charles Baker and Sons*(3), where he says: "One who has invited "or assented to an act being done towards him cannot, when he "suffers from it, complain of it as a wrong"(4).

- 5 That authoritative statement of the rule is in direct conflict with the case of the suppliant, which is that, although the deceased did in fact assent to the use of explosive in respect of the work for which he was engaged, still *Rylands v. Fletcher* makes resulting injury without negligence a wrong for which she is entitled to
- 10 recover. If authority be necessary to resist this suggestion that *Rylands v. Fletcher* applies notwithstanding consent, it is to be found in the statement of Viscount *Finlay* in *Attorney-General v. Cory Bros. and Co., Ltd.*(5), where he says: "The plaintiffs in
- 15 "bringing of the colliery spoil upon their land. In consideration "of payment they allowed Cory Brothers to have the use of their "land for this purpose. There is no authority for applying the "doctrine of *Fletcher v. Rylands* (L.R. 1 Ex. 265 ; L.R. 3 H.L. 330) "to such a case, and, in my opinion, so to apply it would involve
- 20 "an unwarrantable extension of the principle of that decision. "A plaintiff who is himself a consenting party to the accumulation "cannot rely simply upon the escape of the accumulated material ; "he must further establish that the escape was due to want of "reasonable care on the part of the person who made the
- 25 "deposit"(6).

- After the statement of the rule *volenti non fit injuria*, as quoted above, Lord *Herschell* in *Smith v. Charles Baker and Sons*(7) says :
- 30 "The maxim has no special application to the case of employer "and employed, though its application may well be invoked in "such a case. The principle embodied in the maxim has some-
- 35 "times, in relation to cases of employer and employed, been stated "thus : A person who is engaged to perform a dangerous operation "takes upon himself the risks incident thereto. To the proposition "thus stated there is no difficulty in giving an assent, provided that
- 40 "what is meant by engaging to perform a dangerous operation, "and by the risks incident thereto, be properly defined. The "neglect of such definition may lead to error. Where a person "undertakes to do work which is intrinsically dangerous, notwith-
- "standing that reasonable care has been taken to render it as little "dangerous as possible, he no doubt voluntarily subjects himself "to the risks inevitably accompanying it, and cannot, if he suffers,

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(3) [1891] A.C. 325.

(4) *Ibid.*, 360.

(5) [1921] 1 A.C. 521.

(6) *Ibid.*, 539.

(7) [1891] A.C. 325.

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"be permitted to complain that a wrong has been done him, even though the cause from which he suffers might give to others a "right of action"(8).

With the utmost respect I apply that statement of the law to the facts of this case, and regard them most apt for the determination of the question before me. Here a person, the deceased, was "engaged to perform a dangerous operation" and "undertook to do work intrinsically dangerous." "Care has been taken to render it as little dangerous as possible." The deceased "voluntarily subjects himself to the risks." Fatal injuries having resulted, those claiming through him "cannot be permitted to complain that a wrong has been done." Still applying the words of Lord *Herschell*, "the cause for which he suffers might give to others a right of action"—e.g., an involuntary passer-by as in *Miles v. Forest Rock Granite Co. (Leicestershire), Ltd.*(9), by the application of the rule in *Rylands v. Fletcher*(10)—but such a right of action is not available to the suppliant for the reason that the deceased "voluntarily took upon himself the risks incident" to his hazardous work.

The question in the case stated is answered in the negative. 20

The respondent is entitled to costs upon the argument, which I fix at ten guineas.

Question answered: No.

Solicitors for the suppliant: *P. J. O'Regan and Son* (Wellington).

Solicitors for the Crown: *Raymond, Stringer, Hamilton, and Donnelly* (Christchurch).

(8) *Ibid.*, 360.

(9) (1918) 34 T.L.R. 500.

(10) (1866) L.R. 1 Ex. 265; aff. on app. (1868) L.R. 3 H.L. 330.

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DUNEDIN.
1937.
August 6,
Sept. 17.
KENNEDY, J.

AUSTRAL MALAY TIN, LIMITED v. VINCENT COUNTY AND ANOTHER.

Rating—Rateable Property and Exemptions—Assessors—"May"—Whether permissive or obligatory—Whether Assessment Court properly constituted without Appointment of Assessors where Notice of Objection received—Rating Act, 1925, s. 27 (1).

Section 27 (1) of the Rating Act, 1925, which is as follows:—

"The Governor-General may from time to time, on the application of any local authority, appoint two persons to be members of the Assessment Court [for the purpose of hearing and determining objections to the valuation list], in addition to the Judge thereof mentioned in section twenty-five hereof,"

imposes no duty upon a local authority, after it has received notice of objection to an entry in the valuation list, to apply to the Governor-General to appoint two assessors. An Assessment Court is properly

constituted, although no such application is made for assessors and none is appointed.

Julius v. Bishop of Oxford (1), distinguished.

(1) (1880) 5 App. Cas. 214.

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v.

VINCENT

COUNTY.

APPLICATION for a writ of prohibition.

The plaintiff company was the holder of a special dredging claim of 325 acres. The Vincent County caused the name of the plaintiff company to be placed on its valuation list under the provisions of the Rating Act, 1925, in respect of the claim, and the valuation appearing in the list is £23,000. The plaintiff company objected to this valuation, and requested the defendant County to make application to the Governor-General to appoint two assessors in addition to the Judge of the Assessment Court for hearing the plaintiff company's objection. The County refused to make such application, and the defendant Warden, Henry James Dixon, who exercised jurisdiction in the Otago Mining District as Warden of the Warden's Court under the provisions of the Mining Act, 1926, had intimated his intention, if assessors were not appointed, to sit by himself as Judge of the Assessment Court.

The writ was claimed to prohibit the Warden adjudicating upon the objection until assessors had been appointed to sit with him and to prohibit the defendant County from proceeding with the determination of the objection and submitting its valuation list to the Judge of the Assessment Court.

Parcell, in support.

A. N. Haggitt, to oppose.

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provided that the Governor might from time to time on the application of any local authority appoint two persons to be members of the Assessment Court in addition to the Judge thereof. One such person was to be appointed on the recommendation of the local authority, but a member of the local authority was not to be so appointed to act. The two members were to be paid by the local authority such reasonable fees and allowances as might be fixed by the local authority. This section appears in the Rating Act, 1925, as s. 27.

Section 48 of the Rating Act, 1925, provides that all mining property held by any occupier in any county within a mining district in the South Island shall be liable to be rated by the local authority in like manner as other rateable property in the district of such local authority is rated, but subject to the special provisions of the Act relating to mining property. Section 49 (1), (2), (3), and (4) provide for the preparation of the valuation list by valuers appointed from time to time by the local authority. Subsection 5 provides that

All the provisions of this Act relating to the powers of a Valuer, the valuation list, and the valuation roll in a district where the system of rating on the annual value is in force shall (except as otherwise expressly provided) extend and apply to the valuation list to be made for the purposes of this section, and to the valuation roll to be prepared and completed thereon, and every occupier shall have the like right of objection to the rateable value of his mining property as he would under those provisions.

Subsection 6 provides that

The Warden of the district in which the mining property is situated, having jurisdiction under the Mining Act, 1908, shall be the Judge of the Assessment Court; and all the provisions of this Act relating to the powers, duties, and authorities of a Magistrate as Judge of the Assessment Court shall extend and apply to such Warden accordingly, who shall for the purposes of this section have all such jurisdiction and authority as he would have in respect of any matter within his jurisdiction under the Mining Act, 1908, and as fully as if the duties hereby imposed upon him were expressly set forth in that Act.

- way of amendment and after the Judge of the Assessment Court had been acting without assessors for years. The provision is that the Governor-General may appoint "on the application of" the local authority. There is nothing in the section to indicate
- 5 that a local authority *must* apply. When appointed, the members are to be paid such reasonable fees and allowances as may be fixed by the local authority. This provision represents a concession to a local authority enabling it to apply, but, in my view, imposing no duty to apply. There is no indication in the Act that
- 10 an Assessment Court is not constituted if no application is made for assessors and none is appointed. For many years it was constituted without assessors, and if the legislative intention had been, in all cases, to alter its constitution thereafter, the language used would assuredly have been quite different from that of s.
- 15 27. Section 27 merely confers a privilege upon a local authority, for which it must pay, but it does not confer a right upon the objector to insist that the local authority shall avail itself of that privilege. Cases such as *Julius v. Bishop of Oxford*(1) have no application; for they merely indicate that where a power is
- 20 deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the Court will require it
- 25 to be exercised. Here it does not appear that any right of the plaintiff depends upon the local authority making application.

In the result, it follows that the Warden is Judge of the Assessment Court, and may sit without assessors to dispose of the objection. The present application is dismissed. The plaintiff

30 will pay the defendant County for costs the sum of £15 15s. and disbursements.

Application dismissed.

Solicitors for the plaintiff: *Brash and Thompson* (Dunedin), as agents for *Brodrick and Parcell* (Cromwell).

Solicitors for the defendant County: *Ramsay and Haggitt* (Dunedin), as agents for *W. A. Harlow* (Clyde).

(1) (1880) 5 App. Cas. 214.

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GISBORNE.

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August 13;
Sept. 13.

REED, J.

In re HURIMOANA 1B2 BLOCK.

Rating—Native Land—Charge granted by Native Land Court—Receiver—“May”—Whether Native Land Court has Discretion subsequently to refuse to appoint Receiver—Whether Jurisdiction to transfer Liability to other Land or remit—Rating Act, 1925, ss. 102, 108, 109—Native Land Act, 1931, s. 42.

Section 108 of the Rating Act, 1925, provides for the lodging of claims for rates due on Native land and for treating them as charging-orders. Subsection 6 enables the Court to transfer the liability for rates to other land or to remit the whole or part of rates. Subsection 7 says “A charge when granted *may* be enforced by the appointment of a Receiver,” &c. Section 109 provides that if a charge granted under the Act remains unsatisfied for more than one year the Court may . . . order that the land affected . . . be vested in the Native Trustee for the purposes of sale for the payment of such charge.

When the Native Land Court has granted a charging-order for rates under s. 108 of the Rating Act, 1925, it has no discretion subsequently to refuse to appoint a Receiver under subs. 7 thereof unless it is prepared under s. 109 to appoint the Native Trustee for the purpose of sale of the land affected by the charge. Nor upon the hearing of an application to appoint a Receiver or the Native Trustee is there jurisdiction under s. 108 (6) to transfer the liability for rates to other land or to remit the whole or part of rates exercisable by the Court.

Julius v. Bishop of Oxford(1) applied.

(1) (1880) 5 App. Cas. 214.

CASE STATED by the Native Appellate Court, under s. 71 of the Native Land Act, 1931, for the opinion of the Supreme Court. Rates having become due upon certain blocks of Native land, the Cook County Council, proceeding under s. 108 of the Rating Act, 1925, lodged claims in respect thereof with the Registrar of the Native Land Court for the district in which the lands are situated. Such claims are treated (subs. 3) as applications for charging-orders. The procedure laid down by the section having been complied with, the applications were duly heard, and the Native Land Court, in pursuance of subs. 5, granted charging-orders against the blocks of land involved for the respective amount of rates and costs. Some years elapsed since those charging-orders were made, and the Cook County Council, the rates still remaining unpaid, applied to the Native Land Court for the enforcement of the charges by an order, under s. 109 of the Rating Act, 1925, vesting the land affected in the Native Trustee for the purpose of sale for the payment of the charges; or, in the alternative, for an order under s. 108 of the said Act

appointing the Tairawhiti District Maori Land Board as Receiver in respect of the said lands.

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Altogether 184 applications for enforcement of charging-orders were filed, the amounts ranging from 17s. 6d. in respect of the
5 Hurimoana No. 1B2 Block up to £24 for the Tarewauru No. 1 Block. The applications came before the Native Land Court, which definitely refused to make the orders asked for in respect of the above two blocks, and adjourned the others. The minutes of the Native Land Court contain the judgment of the Court as
10 follows :

The Court said that it hesitated to associate itself with the appropriation of land in such a wholesale manner. In many cases the amounts are so insignificant as to appear ludicrous, and as counsel asks for an order in every case, the Court would take two applications only and review the possibilities.

15 APPLICATION NO. 578. HURIMOANA 1B2. 17s. 5d.

[Court]: This land counsel advises is worth £26. It therefore should attract a revenue of £1 6s. per year.

APPLICATION NO. 657. TAREWAURU NO. 1. £24. VALUE, £333.

20 [Court]: Annual revenue here should approximate £16. No Receiver could be expected to find a tenant wishing to take up land for the limited period necessary to pay off the amounts. To put the land on the market for a term attractable to prospective tenants would, except in special cases, be unjust to the owners and an abuse of the duties of Receiver.

Application refused. The others may stand adjourned.

25 The Cook County Council appealed to the Native Appellate Court, and it was there contended that there was no jurisdiction to refuse, and that, as an important legal principle was involved, which affected many other local authorities, it was requested that the Native Appellate Court should state a special case for
30 the opinion of the Supreme Court. The case was stated accordingly, and the Supreme Court was asked for its opinion on the following questions :—

“1. Can the Native Land Court, having granted a charging-
“order for rates under the Rating Act, 1925, refuse to make such
35 “orders as may be necessary to enforce such charge either under
“s. 108 (7) or s. 109 (1) of that Act, as the case may be ?

“2. Is the jurisdiction conferred on the Native Land Court
“by subs. 6 of s. 108 of the Rating Act, 1925, exercisable by the
“Court upon the hearing of application to make the orders referred
40 “to in question 1 ?”

J. Blair, for the Cook County Council.

A. A. Whitehead and *Coleman*, for the Native owners.

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REED J. [After stating the facts, as above:] Native land, with certain exemptions, is liable for rates in the same manner as if it were European land: see s. 102 of the Rating Act, 1925. The principal exemption is customary land. The land in this case is not exempted and it is therefore liable in the same manner as if it were European land. The method of recovery of the rates is, however, different. Instead of proceeding by way of action in Court, as in the case of European lands, the claim for rates, owing upon Native land, is lodged with the Registrar of the Native Land Court. Certain procedure, to which reference will later be made, is prescribed for regulating an inquiry, and the Native Land Court is authorized to grant a charging-order for the amount of the rates and costs, upon the lands affected. Provision is then made for the enforcement of the charge as follows: Section 108 (7) of the Rating Act, 1925, provides:

A charge when granted may be enforced by the appointment of a Receiver in accordance with [an Act repealed, but now, by virtue of s. 18 of the Acts Interpretation Act, 1924, read] s. 42 of the Native Land Act, 1931, and subs. 3, 4, 5, and 6 of that section shall apply to any Receiver so appointed.

Section 42 (1) of the Native Land Act, 1931, provides, *inter alia*:

When any charge has been imposed . . . the Native Land Court may at any time and from time to time, for the purpose of enforcing that charge, appoint a Receiver in respect of the property so charged.

An alternative method of enforcing the charge is provided by s. 109 of the Rating Act, 1925, as follows:

If a charge granted under this Act remains unpaid for one year after the same has been granted by the Court, the Court may upon report of the Receiver or upon being satisfied that it is not expedient in any case to appoint a Receiver, order that the land affected (whether it is then Native land or European land) shall, subject to the consent of the Native Minister, be vested in the Native Trustee for the purposes of sale for the payment of such charge; and such order may at any time, with the consent of the Native Trustee, be varied, cancelled, or superseded.

Subsection 2 gives the Native Trustee appointed as a Receiver full powers of sale, lease, or mortgage for the purpose of liquidating the charge.

The principal question is as to what construction is to be placed on the word "may" in s. 108 (7) of the Rating Act, 1925, and in s. 42 (1) of the Native Land Act, 1931. Is it used to give a discretion, or is it to confer a power which must be exercised for the benefit of those who have been granted a charge? The natural meaning of the word is permissive and enabling only. Words of that nature underwent much discussion in the House of Lords in the well-known case of *Julius v. Bishop of Oxford* (1).

The words there were "it shall be lawful," but, in the speeches of their Lordships, permissive words generally were discussed, the word "may" being treated as in the same class. The observations are, at least, as applicable to "may" as to "it shall be lawful."

- 5 Earl Cairns, L.C., said: "They are plain and unambiguous. "They are words merely making that legal and possible which "there would otherwise be no right or authority to do. They "confer a faculty or power, and they do not of themselves do "more than confer a faculty or power. But there may be some-
- 10 "thing in the nature of the thing empowered to be done, some- "thing in the object for which it is to be done, something in the "conditions under which it is to be done, something in the title "of the person or persons for whose benefit the power is to be "exercised, which may couple the power with a duty, and make
- 15 "it the duty of the person in whom the power is reposed, "to exercise that power when called upon to do so. . . . And "the words 'it shall be lawful' being according to their natural "meaning permissive or enabling words only, it lies upon those, "as it seems to me, who contend that an obligation exists to
- 20 "exercise this power, to show in the circumstances of the case "something which, according to the principles I have mentioned, "creates this obligation"(2). Lord Penzance, after stating that "they are enabling and empowering words," said: "The true "question is not whether they mean something different, but
- 25 "whether, regard being had to the person so enabled—to the "subject-matter, to the general objects of the statute, and to "the person or class of persons for whose benefit the power may "be intended to have been conferred—they do, or do not, create "a duty in the person on whom it is conferred, to exercise it"(3).
- 30 Lord Selborne made much the same observations, and said referring to the facts of the case before the House: "The words "'it shall be lawful,' &c., give him the power to do so; but this "is a power not in aid of a private right, nor for the due course "and administration of justice after the commencement of any
- 35 "prosecution or suit; it is altogether initiatory and pre- "liminary"(4). His Lordship also said: "The question whether "a Judge, or a public officer, to whom a power is given by such "words, is bound to use it upon any particular occasion, or in "any particular manner, must be solved *alivunde*, and, in general,
- 40 "it is to be solved from the context, from the particular provisions, "or from the general scope and objects, or the enactment con- "ferring the power"(5). Lord Blackburn said the words "are

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(2) (1880) 5 App. Cas. 214, 222, 223. (4) *Ibid.*, 235.

(3) *Ibid.*, 230.

(5) *Ibid.*

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“equivalent to saying that the donee may do it ; but if the object
 “for which the power is conferred is for the purpose of enforcing
 “a right, there may be a duty cast on the donee of the power,
 “to exercise it for the benefit of those who have that right, when
 “required on their behalf. Where there is such a duty, it is not
 “inaccurate to say that the words conferring the power are
 “equivalent to saying that the donee must exercise it”(6). Later
 on His Lordship said: “The enabling words are construed as
 “compulsory whenever the object of the power is to effectuate
 “a legal right. It is far more easy to show that there is a right
 “where private interests are concerned than where the alleged
 “right is in the public only, and in fact, in every case cited, and
 “in every case that I know of (where the words conferring a power
 “are enabling only, and yet it has been held that the power must
 “be exercised), it has been on the application of those whose
 “private rights required the exercise of the power”(7). The
 general effect of these speeches is that enabling words are usually
 compulsory where they are words to effectuate a legal right, unless
 controlled by the context, or the general spirit of the statute.

In the present case the order that is sought is a step in the
 enforcement of a legal right to be paid—the rates due. The
 County Council has obtained the judgment of the Court that the
 rates are due, and the only method by which the amount of such
 rates can be recovered is that prescribed by the statute, and for
 which purpose the order is sought. Now, in 1924, a special Act
 was passed the long title of which was

An Act to make Provision with respect to the Making, Levying, and
 Recovery of Rates in respect of Native Lands.

In the following year the consolidating Rating Act, 1925, was
 passed, by which the special Act was repealed, but its provisions
 were embodied under the caption “Part II.—Special as to Native
 “Land Rating.” It is the provisions of that statute that we
 are considering, and, it is to be observed, that they are declared
 to represent the method prescribed by the Legislature for, *inter*
alia, the recovery of rates on Native land. Section 108 is the
 regulating section. I have mentioned the procedure up to the
 lodging of the claim for rates with the Registrar of the Native
 Land Court. It is provided that the lodging of such claim shall
 be treated as an application for a charging-order on the land
 affected. Claims are to be notified for hearing at the first con-
 venient sitting of the Native Land Court. It was stated at the
 Bar that the only notice to Natives affected was through

(6) (1880) 5 App. Cas. 214, 241.

(7) *Ibid.*, 244.

notification in the *Kahiti*. If that be so, it must be by virtue of a regulation of the Native Land Court, and if such notice is insufficient the regulation should be amended. It does not affect the question in issue. Subsection 4 provides :

- 5 The Court shall proceed to hear all objections to the rate, and all defences open to an ordinary ratepayer shall be open to any one or more of the owners or beneficial owners of the land, or to the Maori Land Board, the Native Trustee, or the East Coast Commissioner, as the case may be.

Subsection 5 provides :

- 10 If, after hearing the parties, the Court is satisfied that the rates are payable, it may make an order granting a charge over the land in favour of the local authority for the amount of the rates so payable and the costs of obtaining a charge. Such charge shall be filed and noted in the Court, and if the title has reached the Land Transfer Office may be registered against
- 15 such title. If the title has not gone forward for registration, it shall be the duty of the Registrar to send such charge for registration contemporaneously with the title which it affects.

Subsection 6 provides :

- The Court, in dealing with any claim for rates, may, in cases where it
- 20 thinks it necessary or expedient, transfer the liability for such rates or any part thereof to any other land, and may grant a charge accordingly. In special circumstances arising from hardship or indigency the Court may remit the whole or any part of any rate so levied, and thereupon such rates, or so much thereof as shall be so remitted, shall be deemed to be dis-
- 25 charged.

- Now those subsections contemplate the trial before a judicial tribunal and "after hearing the parties" a judgment as to the rates, and as to the imposition of a charge, in respect of same, on the lands affected. It is contemplated that all matters
- 30 affecting the exercise of the jurisdiction to grant the charge should be determined by the Court and in respect of which the Court has the discretionary powers set out in subs. 6.

- In the present case the charges applied for have been granted, and the matter, so far as that stage in the proceedings is con-
- 35 cerned, is *res judicata*. The effect is to prevent any dealings by the owners of the land affected

without the leave of the Court or the consent of the local authority . . . until the charge is paid or secured.

- At that stage the Council had the security of the land charged
- 40 for the rates owing, but this charge is not subject to payment of interest, and the statute contemplates that "recovery" of the rates means something more than a bare charge, hence the enactment of subs. 7 of s. 108 authorizing the appointment of a Receiver or, in the alternative, under s. 109, the appointment
- 45 of the Native Trustee for the purposes of sale of the land. The objections, made by the Native Land Court, to granting the further step by the appointment of a Receiver, are all matters that should have been dealt with on the application for a charging-order.

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There is no power to reopen those proceedings. Under s. 42 of the Native Land Act, 1931, power is given to appoint a Maori Land Board or the Native Trustee as the Receiver (subs. 3). It is provided in subs. 4 that, subject to the Rules of Court,

A Receiver so appointed shall have the same rights, powers, duties, and liabilities as a Receiver appointed by the Supreme Court in the exercise of its jurisdiction in that behalf. 5

This right, power, or duty is limited, however, by the following subsection, which enacts that for the purpose of enforcing a charge the Receiver 10

may, in his own name and with the leave of the Court, grant leases of any land so charged, or licenses to remove timber, flax, kauri-gum, or minerals therefrom, for any term not exceeding twenty-one years, on such conditions and for such rent or other consideration as he thinks fit.

The Native Land Court, therefore, does not lose all control of the situation. Of course, refusal of leave by the Court must be based on reasonable grounds. 15

To sum up, I am of opinion that it is manifest that the object of the power to appoint a Receiver is to effectuate the legal right of the County Council to receive payment of moneys due in respect of rates, and for the amount of which rates the Court has charged the lands affected. It is also clear from the context in the statutes, and from the general scope and objects of the provisions of the statutes, that the intention of the Legislature was that when the Court has judicially decided that a charge should be granted it has no discretion to subsequently refuse to appoint a Receiver unless it is prepared, under s. 109, to appoint the Native Trustee for the purpose of sale of the land affected by the charge. 25

Counsel cited a number of authorities. I have examined them all, and find that the principles established by *Julius v. Bishop of Oxford*(8) have not been departed from, the cases being merely examples of the application of those principles. 30

Both questions asked I answer in the negative.

Questions answered: No.

Solicitors for the Cook County Council: *Blair and Parker* (Gisborne).

Solicitors for the Native owners: *Coleman and Coleman* (Gisborne).

[IN THE PRIVY COUNCIL.]

MOUNT ALBERT BOROUGH - APPELLANT
 DEFENDANT

AND

AUSTRALASIAN TEMPERANCE
 AND GENERAL MUTUAL
 LIFE ASSURANCE SOCIETY,
 LIMITED - - - - - RESPONDENT
 PLAINTIFF.

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July 22,
 23, 26, 27;
 Oct. 18.

LORD ATKIN.

LORD

MACMILLAN.

LORD

WRIGHT.

LORD

MAUGHAM.

Local Bodies' Loans—Debentures and Interest Coupons issued under Local Bodies' Loans Act, 1913 (now 1926)—Payment of Principal and Interest in Victoria—Victorian Statute reducing Rate of Interest payable under Mortgages—Whether effective to reduce Interest on Debentures issued in New Zealand—Conflict of Laws—Whether Victorian Statute related to Mode of Performance or varied the Obligation under the Contract—Local Bodies' Loans Act, 1913, s. 32—Local Bodies' Loans Act, 1926, s. 37.

The contract between appellant and respondent, including the personal obligation to pay, which could not be severed from the mortgage provisions that secured it, was a New Zealand contract governed by New Zealand law.

The Financial Emergency Act, 1931 (Victoria), as amended and extended in the following year, was directed in express terms to obligation—i.e., to the construction and effect of a mortgage and the reduction of the covenanted rate of interest, and not to the incidents and mode of performance as contrasted with obligation.

The Victorian statute did not apply to the debentures or to the interest payable under it. An intention could not be attributed to the Legislature of Victoria to legislate in regard to matters lying outside its territorial jurisdiction, the land charged under the debentures being in New Zealand; or to vary a New Zealand statute in regard to a New Zealand contract, the debt and the security of which was fixed by a New Zealand statute, the Local Bodies' Loans Act, 1913.

The Victorian Legislature could not have contemplated such an anomalous result as that the New Zealand Courts, which, *prima facie* at least, were bound to give effect to New Zealand statutes, should be required to treat the statutes of the New Zealand Legislature as varied by the Legislature of another State.

The King v. Mayor, &c., of Inglewood(1) approved.

Auckland City Corporation and Auckland Transport Board v. Alliance Assurance Co., Ltd.(2), applied.

Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.(3), distinguished.

Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.(4), and *Wanganui-Rangitikei Electric-power Board v. Australian Mutual Provident Society*(5), referred to.

So held by the Judicial Committee of His Majesty's Privy Council affirming the judgment of the Court of Appeal (*Myers, C.J., and Reed, Smith, Johnston, and Fair, J.J.*), reported [1935-36] 1 N.Z.L.G.R. 157.

(1) [1931] N.Z.L.R. 177.

(2) *Ante*, 4.

(3) [1934] A.C. 122.

(4) (1932) 48 C.L.R. 391.

(5) (1934) 50 C.L.R. 581.

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APPEAL (No. 19 of 1937) from the Supreme Court of New Zealand from a judgment entered pursuant to the unanimous judgment of the Court of Appeal (*Myers, C.J., and Reed, Smith, Johnston, and Fair, JJ.*) answering questions of law removed into that Court, reported [1935-36] 1 N.Z.L.G.R. 157. The facts sufficiently appear from the judgment. 5

John O'Shea, of the New Zealand Bar, for the appellant.

Cyril Radcliffe, K.C., and B. M. Cloutman, for the respondent.

Cur. adv. vult.

The judgment of their Lordships was delivered by

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LORD WRIGHT. This appeal raises a question under that branch of the common law conveniently, though perhaps not quite accurately, described as the conflict of laws. The question is whether the obligation to pay in Melbourne the interest on debentures issued in New Zealand by the appellant is affected by a statute of the State of Victoria reducing the rate of interest. The respondent is a life-insurance company incorporated in Victoria and carrying on business in Australia and New Zealand. The appellant is a body corporate constituted under the Municipal Corporations Act, 1933, and controls a borough in the suburbs of the City of Auckland. It is a local body within the meaning of the Local Bodies' Loans Act, 1926, which repealed and replaced the Local Bodies' Loans Act, 1913, and earlier Acts. The action was brought by the respondent to recover £446 17s. 6d. as being the balance short paid in respect of interest to the respondent as holder of debentures for a total sum of £130,000 issued by the appellant under the circumstances later set out. The respondent claimed that the interest due on March 1, 1935, was £3,696 17s. 6d., but the appellant paid £3,250 and claimed that this sum was sufficient to satisfy the respondent's rights, on the ground that as the interest was payable to the respondent at Melbourne, the payment was governed by the Financial Emergency Act, 1931, of Victoria, and amending Acts, which provided for reductions in interest payments. The question is whether the Act applies to the appellant's obligation. 15 20 25 30

As the question was purely a question of law, *Myers, C.J.*, ordered that the following questions of law should be argued and determined in the Court of Appeal of New Zealand, namely:— 35

1. Whether the Victorian statutes mentioned in para. 11 of the statement of defence and counterclaim had any application to the debentures for £130,000 issued to the plaintiff by the defendant. 40

2. Whether the interest payable under the said debentures was reduced by the said provisions of the said Victorian statutes as provided in s. 19 of the Financial Emergency Act, 1931, No. 3961 Victoria, as from October 1, 1931.

- 5 3. Whether, if the said statutes applied, the defendant was entitled to a refund of excess payments of interest made since October 1, 1931, in ignorance of the effect of the said statutes, on the ground of mistake.

The Court of Appeal, after taking time to consider the case, unanimously answered questions 1 and 2 in the negative. Accord-
10 ingly question 3 did not arise.

For the purposes of convenience a specimen debenture No. 1 and interest coupon No. 18 were placed before the Court. The debenture was in the following form :—

DEBENTURE.

15 No. 1. £1,000.

MOUNT ALBERT BOROUGH COUNCIL.

of the Borough of Mount Albert, Auckland, New Zealand.

1926 ROADING LOAN OF £537,500,

- 20 secured on a special rate of threepence in the pound on the rateable value of all rateable property in the Borough of Mount Albert (with provisions for a sinking fund of one per cent. per annum).

DEBENTURE FOR £1,000 payable at the Bank of New Zealand, Melbourne, Victoria, on the first day of March, 1963.

- 25 Issued by the Mount Albert Borough Council, of the Borough of Mount Albert, Auckland, New Zealand, under the Local Bodies' Loans Act, 1913.

N.B.—The holder of this debenture has no claim in respect thereof upon the Government or public revenues of New Zealand.

- 30 ON PRESENTATION OF THIS DEBENTURE at the Bank of New Zealand, Melbourne, on or after the first day of March, 1963, the bearer thereof will be entitled to receive £1,000 (one thousand pounds sterling).

Interest on this debenture will cease after the day when the payment falls due, unless default is made in payment.

- 35 THIS DEBENTURE bears interest at the rate of £5 13s. 9d. per cent. per annum, payable on the first days of March and September in each year, on presentation of the attached coupons at the Bank of New Zealand, Melbourne.

ISSUED under the Common Seal of the Corporation of the Borough of Mount Albert, the 31st day of August, 1926.

(Signed) LEONARD E. RHODES, Mayor.

(Signed) H. UTTING, Treasurer.

40 (SEAL.)

COUPON No. 18.

DEBENTURE No. 1.

1926 ROADING LOAN OF £537,500

OF THE MOUNT ALBERT BOROUGH COUNCIL, OF THE BOROUGH OF MOUNT ALBERT, AUCKLAND, NEW ZEALAND.

- 45 Issued under the Local Bodies' Loans Act, 1913, secured on a special rate of threepence in the pound on the rateable value of all rateable property within the Borough of Mount Albert.

- 50 ON PRESENTATION of this coupon at the Bank of New Zealand, Melbourne, Victoria, on or after the FIRST DAY OF SEPTEMBER, 1935, the bearer hereof will be entitled to receive £28 8s. 9d.

LEONARD E. RHODES, Mayor.

H. UTTING, Treasurer.

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The debentures and interest coupons were issued to the respondent, who at all material times was the bearer of them, in pursuance of an agreement dated September 4, 1926, made between the appellant as borrower and the respondent as lender. The agreement was executed under the common seal of the appellant in Mount Albert. A carbon copy was executed by the respondent in Melbourne. The agreement recited that the appellant had taken all necessary steps and had complete authority of law, to borrow by way of special loans under the Local Bodies' Loans Act of 1913 various sums of money totalling in all £750,000 for specified local improvements, such as road, drainage, and other like purposes, secured by special recurring rates to be made and levied upon the rateable value of all rateable property within the borough of Mount Albert. The agreement provided that the respondent should pay to the appellant the moneys agreed to be lent at the respective dates specified at a bank in Auckland and in return the appellant should hand over to the respondent the debentures and interest coupons in the form agreed. This was in fact done, and the appropriate number of debentures and interest coupons, specimens of which are set out above, were duly delivered by the appellant to the respondent.

As the debentures and coupons were in terms issued under the Local Bodies' Loans Act, 1913, it is necessary to refer to the material provisions of that Act, which deals generally with the special loans of local bodies in New Zealand. It will be referred to as the "Loans Act." The Loans Act of 1926, now in force, has been used in the argument of this appeal, the sections relevant to this case being identical save in respect of numbering in some cases with the corresponding sections of the Loans Act of 1913.

The Loans Act requires that certain preliminary steps for the obtaining of the consent of the ratepayers should be taken. These conditions the appellant, as a local body acting under the Loans Act, had duly fulfilled. The other provisions which seem to be here material relate to the raising of the loan by the issue of debentures which are to be in the form prescribed by the Act. That statutory form was complied with in the debentures now being considered. Debentures and coupons were to be transferable by delivery and payable to bearer, as were those in question. As security for a loan the local body was empowered to pledge, *inter alia*, a special rate made and levied for the purposes of the special loan. In the present case, as appears on the face of the debenture, the loan was secured on a special rate of threepence in the pound on the rateable value of all rateable property in the Borough of

- Mount Albert (with provisions for a sinking fund of 1 per cent. per annum). This sinking fund, which was duly created, was in accordance with the Loans Act, which provided that the sum of money named in any debenture and in any coupon should on
- 5 maturity be a debt due to the holder by the local authority payable at the place within or out of New Zealand named in the debenture, and that for the purposes of such repayment a sinking fund might be created by the appropriation and pledging of part of the local fund. The provisions of the Loans Act dealing with a case of
- 10 default in paying the sums secured are important. They enable the Supreme Court of New Zealand on petition to appoint a receiver of such part of the local fund or other property of the local authority charged for payment of the debenture or coupon; on the appointment of a receiver all such property is to vest in him and he is to
- 15 have powers of sale of such property.

It is clear that the charge on the rates is a charge on land in New Zealand: *The King v. Mayor, &c., of Inglewood*(1), citing *Payne v. Esdaile*(2).

- It is now necessary to advert to the Victorian statute, which is
- 20 relied on by the appellant as reducing the rate of interest payable under the debentures. That statute is the Financial Emergency Act, 1931, No. 3961, as amended by the Financial Emergency Act, 1932, No. 4106. The recital to the Act of 1931 stated that it was desired to devise measures for meeting the grave financial emergency
- 25 existing in Australia and thereby averting disastrous consequences, and that a plan had been devised for re-establishing the financial stability of the Commonwealth and States and restoring industrial and general prosperity by means involving a common sacrifice and including, among other things, certain reductions in the expenditure
- 30 of the Commonwealth and State Governments and the conversion of the internal public debts of the Commonwealth and States on the basis of a reduction of the interest payable. Part III of the Act dealt with, *inter alia*, "reduction of interest on mortgages and "other securities." Section 14 (1) defined the Court for the
- 35 purposes of the Act as the Supreme Court [Supreme Court of Victoria], or a Judge, or, in certain cases, a Court of Petty Sessions. Mortgage was thus defined:—

Mortgage means any deed, memorandum of mortgage, instrument, or agreement whereby security for payment of money is granted (whether by

40 virtue of such deed, memorandum, instrument, or agreement or of any Act) over real or personal property or any interest therein; and without affecting the generality of this definition includes a mortgage given as security for money granted by a bank or corporation on overdraft; and also includes

- (a) Any debenture, inscribed stock, or mortgage issued, created, or given
- 45 by any public or local authority.

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The words public or local authority are later defined as meaning any local authority within the meaning of the Public Contracts Act, 1928, and as including the State Electricity Commission of Victoria, the County Roads Board and similar bodies, and any municipality including the City of Melbourne and the City of Geelong.

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Section 14 (1) (b) adds as coming within the word "mortgage":—

An agreement for sale and purchase of real or personal property under which interest is payable in respect of the whole or any portion of the purchase-money.

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It is not here necessary to quote the remaining definitions in the section.

Section 19 (1) is the governing section for purposes of this appeal. It is in the following terms:—

Except as hereinafter provided every mortgage shall for a period of three years from the date of the coming into operation of this Division be construed and take effect as if it were a term of the mortgage that on and from the coming into operation of this Part or (in case of a bank or pastoral company overdraft or in the case of a mortgage given to a society registered under the Building Societies Act, 1928) on and from the appointed day or the prescribed day (as the case may be) the interest payable under the mortgage should be reduced at a rate equivalent to four shillings and sixpence for every pound of such interest.

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The period was subsequently extended and the provision was in force at the material date. Under the Act interest was not to be reduced to a rate less than £5 per cent. per annum. It was also enacted that a mortgagee was entitled to apply to the Court for an order excluding or modifying in certain events the operation of this section of the Act; if the application was made to petty sessions it was to be made to the Court of Petty Sessions held nearest to the location of the property the subject of the mortgage.

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Section 28 (1) entitled a mortgagor to apply to the Court where under the mortgage any interest accrued, due, and payable was not in arrear or not more than six months' interest due and payable was in arrear for an order that the mortgagee should not within a period of twelve months after the coming into operation of this Part of the Act exercise in respect of the property comprised in the mortgage any power of sale or foreclosure or other remedy for enforcing payment of the principal moneys thereby secured or interest, if any, in arrear at the time of such application.

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Section 37 was as follows:—

Nothing in this Part shall apply to any mortgage given as security for moneys raised by any public or local authority by way of loan outside Australia.

The above provisions of the Act have been set out in detail as bearing on the question which goes to the root of this appeal,

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which is whether the Financial Emergency Acts entitle the appellant to rely on them in the New Zealand Courts in regard to the debentures and interest coupons. If they do not, then the defence based on s. 19 (1) fails. Their Lordships agree with the unanimous judgment of the Judges of the Court of Appeal that the Acts do not furnish a defence to the appellants for various reasons. But it will be convenient before developing these reasons to deal with some general considerations.

- The debentures and the interest coupons in so far as they give a security on real property—namely, a portion of the local rate in New Zealand—are beyond question governed by the New Zealand law. The security can be enforced only in the Courts of New Zealand and in the manner provided by the Loans Act. It is not disputed that these rights are governed by New Zealand law. But in their Lordships' judgment it is equally true that the personal obligation to pay is a New Zealand contract, governed by New Zealand law. It seems impossible to sever this personal covenant from the mortgage provisions which secure it. Indeed the whole tenor of the transaction is only consistent with its being governed by New Zealand law. The loan was agreed in New Zealand, the money under the loan was paid by the respondent to the appellant there. The appellant is a statutory body in New Zealand which in borrowing were acting under the statutory powers contained in the Loans Act as set out above. The respondent carried on business in New Zealand as well as in Australia. It is true that the place of repayment of the loan and of payment of interest from time to time was to be Melbourne, in Australia. But even that was fixed in accordance with s. 32 of the Loans Act of 1913 (s. 37 of the Act of 1926), which required payment of the debt to be at the place, within or out of New Zealand, named in the debenture so that the obligation to pay has statutory sanction.

Mr. O'Shea in his able and exhaustive argument has contended that the payment is governed by Victorian law because Victoria is the place of performance and that Victorian law for this purpose includes s. 19 (1) of the Financial Emergency Act. He further contends that s. 19 (1) applies to the debt because it is a specialty debt, and the coupon, which is the document of title, must necessarily be presented at the place of payment in Melbourne when payment is due and demanded, and thus at the relevant moment the *lex situs* applies so as to introduce the statutory reduction of interest.

Their Lordships are not prepared to accept either contention. While they think that the *lex situs* applies to the security in New Zealand, they do not think that the *lex situs* of the actual coupon

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can be applied to the instrument, whether or not the personal obligation to pay is properly regarded as a specialty debt. Nor can they accept the view that the obligation to pay is here governed by the place where it is stipulated that payment is to be made, in the sense that the amount of the debt as expressed in the instrument creating it can lawfully be varied by the Victorian Financial Emergency Act so as to bind a foreign jurisdiction or indeed at all. So to hold would be, in their Lordships' judgment, to confuse two distinct conceptions—that is, to confuse the obligation with the performance of the obligation. It is well established in the law of England and of New Zealand, which in this respect follows it, that the proper law of a contract has to be first ascertained where a question of conflict of laws arises.

The proper law of the contract means that law which the English or other Court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive rigid or arbitrary criteria such as *lex loci contractus* or *lex loci solutionis* and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case *prima facie* their intention will be effectuated by the Court. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which as just and reasonable persons they ought or would have intended if they had thought about the question when they made the contract. No doubt there are certain *prima facie* rules to which a Court in deciding on any particular contract may turn for assistance, but they are not conclusive. In this branch of law the particular rules can only be stated as *prima facie* presumptions. It is not necessary to cite authorities for these general principles. Sometimes their application involves difficulty. But not in this case. It has been already pointed out that there are in their Lordships' opinion such circumstances as lead to the inference that in the present case the proper law of the contract is the law of New Zealand, and accordingly that law should *prima facie* govern the rights and obligations to be enforced under the contract by a Court before which the matter comes, *a fortiori* a New Zealand Court. It is true that when stating this general rule, there are qualifications to be borne in mind, as for instance, that the law of the place of performance will *prima*

- facie* govern the incidents or mode of performance—that is, performance as contrasted with obligation. Thus in the present case it is not contested that the word “pound” in the debenture and coupon is to be construed with reference to the place of payment
- 5 and as referring to the “pound” in Victorian currency. Again, different considerations may arise in particular cases, as, for instance, where the stipulated performance is illegal by the law of the place of performance. But there is no question of illegality here, since the Victorian statute is not prohibitory.
- 10 Mr. O’Shea relied on certain expressions used in *Adelaide Electric Supply Co. v. Prudential Assurance Co.*(3) as indicating that the House of Lords there laid down that the law of the place of performance applied for all purposes relating to performance, even to the extent of changing the substance of the obligation
- 15 expressed or embodied in the contract, with the result in the present case that the amount of the interest was reduced by the effect of the Financial Emergency Acts.

- Their Lordships cannot accept this reading of the *Adelaide* case. The House of Lords was not concerned there with any such
- 20 general question or with questions of the substance of the obligation which in general is fixed by the proper law of the contract under which the obligation is created. The House of Lords was concerned only with performance of that obligation, in regard to the particular matter of the currency in which payment was to
- 25 be made. There was no question such as a reduction in the amount of the debt or liability, or other change in the contractual obligation. The House of Lords had no intention of questioning the distinction emphasized in *Jacobs, Marcus, and Co. v. Crédit Lyonnais*(4) between obligation and performance. Indeed, that
- 30 line of authorities was not referred to either in argument or in the speeches.

- It may be that in some cases difficulties have arisen in distinguishing “obligation” from “performance” and that “manner and mode of performance” may affect the value of the
- 35 obligation. But the Victorian statute here is in express terms directed to “obligation”—that is, to the construction and effect of the mortgage, and the reduction of the covenanted rate of interest. In the *Auckland City Corporation and Auckland Transport Board v. Alliance Assurance Co., Ltd.*(5), this Board has
- 40 recently adverted to that distinction between obligation and performance. This way of considering the present case has been fully elucidated in the very careful judgments of the Court of

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(4) (1884) 18 Q.B.D. 589.

(5) [1935–36] 1 N.Z.L.G.R. 157.

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Appeal. Their Lordships do not desire to be thought to express any dissent from these judgments, in so far as they hold that the Financial Emergency Acts do not operate to reduce the amount of the interest in this case, or proceed on the ground that to recognize the application of the Acts, as the appellant contends should be done, would not be to apply the law of the place of performance to the performance of the contract, but to apply it so as to change the substance of the obligation, because according to the appellant's contention the Acts would be applied to change the amount payable, which is a matter of obligation and is not a mode or manner of performance. But their Lordships do not feel it necessary to pursue this aspect of the case at any greater length, or to give any final opinion upon it, because they think that the appeal can be determined on the single ground that in their Lordships' judgment, which again agrees with that of the Court of Appeal, the Financial Emergency Acts do not apply to these debentures, or to the interest payable under them. This is the subject of questions 1 and 2 quoted above, which the Court of Appeal have answered in the negative, holding that the Victorian statutes have no application to the debentures or coupons. It is true that the debentures are mortgages in the sense in which the mere word mortgage is used in s. 14 (1) of the Act of 1931. But they are not, in their Lordships' judgment, mortgages within the meaning of the Acts. To hold that the Act applied to the debentures would be to attribute to the Victorian Legislature an intention to legislate in regard to matters lying outside its territorial jurisdiction, because the land charged under the debenture is in New Zealand. The authority vested by the Victorian Constitution in the Legislature of the State of Victoria is to legislate for the peace, order, and good government of Victoria. It is true that the principal moneys and the interest are payable in Victoria, but they are payable under New Zealand contracts, and, furthermore, to change the amount of the debt would be to affect the security on the land, which is extra territorial so far as Victoria is concerned. There are the further points that the extent of the security is defined by the debt, and that both the debt and the security are fixed by the New Zealand statute, so that to accede to the appellant's contention would be to treat a New Zealand Act as varied in regard to a New Zealand contract by Acts of the Victorian Legislature.

Clear and precise words would be needed before an intention could be attributed to the Victoria Legislature to purport to exercise a jurisdiction of this character. But a careful consideration of the terms of the sections quoted above show that though the

- general definition of mortgage in s. 14 (1) is wide enough to cover any mortgage of any land anywhere in the world, the intention of the Acts is to limit it to Victorian mortgages. This appears, *inter alia*, from the definition of public or local authority, which
- 5 could not apply to the appellants because it is limited to such bodies in Victoria. The Court as defined is a Court in Victoria. If application is made to a Court of Petty Sessions, it must be made to the Court of Petty Sessions held nearest to the location of the property which is the subject of the mortgage. Section 28 relates
- 10 to applications to a Victorian Court, which again if made to a Court of Petty Sessions must be to the Court held nearest to the location of the property which is the subject of the mortgage. Section 37 is clearly limited to Victorian bodies. These and other indications show the territorial limitation of the enactments. It is
- 15 not necessary to rely on the recitals, which, however, seem to show that the purpose of the Acts had reference to internal debts in Victoria, and not to the relief of foreign debtors.

- These particular considerations confirm the general presumption which always exists against a Legislature exceeding its legitimate
- 20 jurisdiction, and seem to their Lordships to be sufficient without more to justify the decision of the Court of Appeal that these Victorian statutes have no application to the debentures or to the interest. The debentures though mortgages are not mortgages to which the Acts apply. But the material question may be
- 25 stated in even narrower terms as being whether the Court of New Zealand ought to give effect to these Victorian statutes. The matters concerned are mortgages of land—that is, the local rates which issue out of the land—situate in New Zealand. The charge is subject to New Zealand statutes, which also define and sanction
- 30 the obligation to pay the debts both principal and interest. The machinery for enforcing the security is also provided for by the statute. No other Court anywhere in the world has jurisdiction to enforce the security. The New Zealand Courts are, *prima facie* at least, bound to give effect to the New Zealand statutes. Their
- 35 Lordships cannot accept so anomalous a conclusion as that the New Zealand Courts are required to treat the Acts of the New Zealand Legislature as varied by the Legislature of another State. Their Lordships do not think that such a result was contemplated or intended by the Victorian Legislature.
- 40 Two important cases decided in the High Court of Australia having a bearing on the question just debated have been cited to the Board. These cases have not been argued before their Lordships, but referred to by way of illustration, and their Lordships

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do not express any final judgment upon them. All their Lordships desire to say here is that they do not conflict with what is said in the present judgment. In each case the appeal was from the Courts of the State which had enacted the legislation. The earlier was *Barcelo v. Electrolytic Zinc Co. of Australasia, Ltd.* (6). 5
The questions arose under the same Victorian statute as is material in this appeal, the Financial Emergency Act, 1931. The High Court was called upon to decide whether s. 19 (1) applied to the debentures of the respondent company. The debentures were secured by a trust deed executed and kept at Melbourne, which 10
created a fixed charge over real property in Tasmania and a floating charge over the rest of the company's property in other places. Interest was payable in Melbourne or London. But the essential circumstances on which the High Court, or at least the majority of the Court, acted in holding that the law of Victoria governed 15
the transaction, so that s. 19 (1) applied to these debentures, was that it was a term of the trust deed that "these presents shall be "construed according to the law of the State of Victoria" and the debentures charged the property in terms of the trust deed. This provision was held (at least by the majority of the Court) to bring 20
within the scope of the Act the debentures, which had a Victorian element. It was accordingly held that the interest was reduced under the Act. The reasons given by the Judges are not entirely uniform. *Rich, J.*, was content to say that the Act applied because, the debentures being transactions which in a real and practical 25
sense concerned Victoria, it was clear that the governing law of the obligation was, as it was expressly agreed to be, Victorian. *Starke, J.*, held that the scope of the Acts extended to every mortgage of property in Victoria, and every mortgage given or to be performed in Victoria, and every mortgage of which the proper 30
law of the contract was that of Victoria. *Dixon and McTiernan, JJ.*, found a sufficient reason in the circumstance that the governing law of the debentures was Victorian. *Evatt, J.*, based his decision on the term in the trust deed. He said: "The parties themselves "not the Victoria Legislature 'intended' their rights and liabilities 35
"to be ascertained and enforced by reference to the Victorian "law of mortgages and for this purpose their agreement is "meaningless unless it implies that the general law of Victoria "is to be applied to the transaction without paying regard to the "limited territorial application which is a characteristic and 40
"inevitable feature of all Victorian laws" (7). It seems clear that none of the reasons which induced the High Court to arrive at

their conclusion would apply to the attitude to be adopted by the New Zealand Court in regard to the Victorian legislation on the facts of the present appeal.

- The other case cited from the High Court of Australia was
- 5 *Wanganui-Rangitikei Electric-power Board v. Australian Mutual Provident Society*(8). The borrowers in that case were a New Zealand Corporation subject to the Loans Act, the lenders were another Australian Insurance Company. The debentures in question were secured on the local body's rate in New Zealand. The
- 10 question was whether the New South Wales Interest Reduction Act, 1931, applied to the interest payable in New South Wales upon the debentures. The action was brought in New South Wales. It was held by the majority of the High Court that the Act did not apply to reduce the interest. Of the majority, *Dixon, J.*, held
- 15 that under the language of the Act it only extended to obligations arising under the law of New South Wales and did not include an obligation which arose under and was governed by the law of New Zealand. *Evatt, J.*, found the guiding clue in s. 17 of the Interpretation Act, 1897, of New South Wales, which limited, unless
- 20 the contrary intention should appear, the operation of New South Wales Acts to matters and things "in and of" New South Wales. *McTiernan, J.*, expressed the same view. This authority seems on the whole to support the view that the debentures and interest in question in this appeal are outside the scope of the Victorian
- 25 Act. There is no corresponding Interpretation Act in Victoria, but it seems that a similar legislative limitation should be deduced from the general principles of the Victorian Constitution.

- On the whole case their Lordships are of opinion that the New Zealand Court of Appeal was right in refusing to give effect, in the
- 30 circumstances of the case, to the Financial Emergency Acts and that the appeal should be dismissed with costs.

They will humbly so advise His Majesty.

Appeal dismissed.

Solicitors for the appellant: *Gamlen, Bowerman, and Forward* (London).

Solicitors for the respondent: *Hewitt, Woollacott, and Chown* (London).

(8) (1934) 50 C.L.R. 581.

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[IN THE SUPREME COURT.]

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MYERS, C.J.
OSTLER, J.
SMITH, J.
FAIR, J.

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DEFENDANT

APPELLANT

AND

KINSMAN (INSPECTOR OF FACTORIES) RESPONDENT
INFORMANT.

Factories Acts—"Handicraft"—Whether Skill involved—"Preparing or manufacturing goods for trade"—Whether Building for Maintenance and Running-repairs of Tram-cars constitutes "preparing"—"Factory"—Effect of Operation of a Factory in adjacent Buildings—Factories Act, 1921-22, ss. 2, 64.

The definition of "factory" contained in s. 2 of the Factories Act, 1921-22, so far as is relevant, is as follows:—

"Any building . . . in which one or more persons are employed . . . in any handicraft, or in preparing or manufacturing goods for trade or sale, and includes any building . . . in which work as is ordinarily performed in a factory is performed for or on behalf of any local authority whether for trade or sale or not."

Section 64 of the statute provides:

"Where the operations of a factory are carried on in several adjacent buildings . . . , all of them shall be included as one and the same factory, notwithstanding that they may in fact be separated or intersected by a road, street, or stream . . . "

The appellant Corporation had a workshop at Kilbirnie, which came within the definition of a factory and was registered as such, and in which the work of manufacturing and equipping cars before they were placed on the road and all major repairs were done. Adjoining the workshop and separated from it merely by a wall, in which there were two doors, was a car-shed in which tram-cars were housed when not in use, and while so housed were inspected, cleaned, and oiled, and any incidental running-adjustments needed were done at night. Such work did not involve skill. A Magistrate held that such tram-shed was a "factory" within the above definition, and that double rates of pay should be paid to a worker employed in the tram-shed on a Sunday.

On appeal from a conviction for an alleged breach of s. 15 of the Factories Amendment Act, 1936,

Held, per totam Curiam, allowing the appeal, 1. That the term "handicraft" involves skilled manual labour, and, therefore, no one was employed in "handicraft" in the car-shed.

Armstrong v. Maxwell (1) approved.

2. That the phrase "preparing goods for trade or sale" does not include maintenance work or repairs for the purpose of merely enabling an article previously put into commission to be continued in use, and, therefore, no one was employed in "preparing goods for trade or sale" in the car-shed.

Semble, per *Myers*, C.J., and *Smith*, J., the words "trade" and "sale" are words *ejusdem generis*.

Henry Bull and Co., Ltd. v. Holden(2) and *Billingham v. New Zealand Loan and Mercantile Agency Co., Ltd.*(3), applied.

Potteries Electric Traction Co., Ltd. v. Bailey(4) and *In re Kelburn and Karori Tramway Co., Ltd.*(5), referred to.

3. That s. 64 did not apply, as none of the operations of a factory was carried on in the car-shed.

Keddie v. South Canterbury Dairy Co., Ltd.(6), distinguished.

(2) (1912) 13 C.L.R. 569.

(3) [1914] V.L.R. 321.

(4) [1931] A.C. 151.

(5) (1936) 36 Bk. of Awards, 493.

(6) (1907) 26 N.Z.L.R. 522.

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APPEAL, by way of case stated, from the determination of a Stipendiary Magistrate at Wellington, who convicted the appellant Corporation on the information of the respondent under s. 15 of the Factories Amendment Act, 1936, for that it being the
5 occupier of a factory within the meaning of the Factories Act, 1921-22, and its amendments, employed one Thompson as a tramcar-adjuster in the tram-sheds at Kilbirnie on Sunday, January 10, 1937, in a factory in which work is regularly performed on Sundays, and did fail to pay the said worker in addition to
10 his ordinary rate of pay for the time so worked at not less than the ordinary rate of pay.

After hearing evidence, the learned Magistrate convicted the appellant of the said alleged offence, and ordered it to pay costs.

The following facts were proved or admitted:—

15 The appellant was the occupier of three car-sheds at Kilbirnie, Newtown, and Thorndon, respectively; and the work done at these car-sheds consisted of inspecting, cleaning, and oiling tramcars and making minor running-adjustments thereto. The appellant's main car-workshops were at Kilbirnie, to which all
20 cars requiring repairs were sent. The workshops at Kilbirnie were registered as a factory, but the car-sheds at Kilbirnie, Newtown, and Thorndon were not so registered. The car-workshop at Kilbirnie was separated from the car-shed by a wall having one or two doors for access purposes. On Sunday, January 10,
25 1937, the appellant employed Thompson as a car-adjuster in the Kilbirnie car-shed, but paid him at the ordinary rate of wages. A car-adjuster took from one to three nights to learn his duties, which comprised an inspection and noting of defects and breakages; where necessary, replacing motor-suspension springs,
30 stopping air-pipes from leaking, replacing ball hanger-bolts, &c.; but not the replacement of broken strap-hangers, which went to the repair-shop. The tools used by a car-adjuster were a vice,

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hacksaws, files, hammers, jacks, and wrenches. The major part of his work consisted of filing, sawing, replacing, and securing worn or broken articles of equipment which were supplied and ready for use.

On the part of appellant it was contended that a car-shed was not a "factory" within the meaning of the Factories Act, 1921-22, and its amendments; and, particularly, that the work done was not a "handicraft." Respondent contended that Thompson was employed in the car-shed at Kilbirnie in a "handicraft"; that he was employed in such car-shed in preparing goods for trade; and that the car-shed in which he was employed was a "factory" within the meaning of the Factories Act, 1921-22.

The appellant appealed against the conviction on the ground that the Magistrate's decision was erroneous in point of law in holding that each of the appellant's car-sheds was a "factory" within the meaning of the Factories Act, 1921-22, and its amendments.

Weston, K.C., and *J. R. Marshall*, for the appellant Corporation.

C. H. Taylor, for the respondent.

Weston, K.C., for the appellant. By s. 15 (1) of the Factories Amendment Act, 1936, workers employed in factories on Sundays must be paid double rates of pay. The question is whether appellant's tramway car-shed is a "factory": Factories Act, 1921-22, ss. 2, 64. The work done in the car-sheds is cleaning and minor adjustments and replacements; repairing is done in the workshop, which it is conceded, is a "factory" and is a separate establishment, where all the work is done in the daytime. It is common ground that cleaning, minor adjustments, and replacements are not manufacturing.

The work done in the car-shed, cleaning and minor maintenance, cannot be considered as "preparing or manufacturing goods for trade or sale": *In re Kelburn and Karori Tramway Co., Ltd.*(1). Maintenance is not work ordinarily performed in a factory: *Potteries Electric Traction Co., Ltd. v. Bailey*(2). For the corresponding definition of "factory" see the Factory and Workshop Act, 1901 (Eng.), s. 149, but maintenance has never been considered as constituting a factory: *Curtis v. Skinner*(3), approving *Nash v. Hollinshed*(4); and *Caledonian Railway Co. v. Paterson*(5). *Mooney v. Edinburgh and District Tramways*

(1) (1936) 36 Bk. of Awards, 493. (3) (1906) 95 L.T. 31.

(2) [1931] 1 K.B. 385, 388, 497; (4) [1901] 1 K.B. 700.

rev. on app. [1931] A.C. 151, (5) (1898) 1 F. (Ct. of Sess.) 24.
162, 168, 173, 180.

Co., Ltd.(6), is distinguishable on the facts found by the majority of the Court. Only "work ordinarily performed in a factory" makes a building belonging to a local authority a "factory": Factories Act, 1921-22, s. 2. The only work ordinarily done in New Zealand (apart from handicraft) is that of "preparing or manufacturing goods for trade or sale"; such work as adjusting and cleaning tram-cars is not "work ordinarily performed in a factory." "Manufacturing" and "maintenance" are distinct processes, usually performed by different people or organizations; and the cleaning and minor maintenance of an article already sold and not for sale is not work "ordinarily performed in a factory."

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If the object or motive of preparing for trade or sale be removed, maintenance can never be "preparing" for trade or sale. The "preparing" of goods without more (such as "for trade or sale") is meaningless, and surplusage. The words "for its own use" cannot be implied, as the words "for and on behalf of any local authority" are descriptive of the employer. The word "preparation" means making ready in the first instance, and does not suggest maintenance.

[To MYERS, C.J. If "whether for trade or sale or not" were not in the definition, a local authority might refuse to be bound by the Act on the ground that the work is done for its own use. It is "preparing or manufacturing goods for sale" that makes a private person's building a "factory."]

"Preparing" implies some process antecedent to the first occasion on which the goods were traded or sold, and cannot apply to some process subsequent to their manufacture: "Preparing" does not mean "prepared from time to time": the antecedent nature of the process of "preparing or manufacturing" clings to the words "for trade or sale." "Trade" cannot mean "use": it means to barter, to buy or sell, to traffic: *Webster's New International Dictionary*, 2181; *Billingham v. New Zealand Loan and Mercantile Agency Co., Ltd.*(7); *Palmer v. Snow*(8); and *Bailey v. Potteries Electric Traction Co., Ltd.*(9).

"Handicraft" is carried on in the workshop; but the work done in the car-sheds is of the simplest nature and requires no great manual dexterity or skill, no knowledge of a calling acquired

(6) (1901) 4 F. (Ct. of Sess.) 390, 394. (8) [1900] 1 Q.B. 725.

(7) [1914] V.L.R. 321, 325.

(9) [1931] 1 K.B. 385, 498.

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by many years of experience or by heredity, such as is exercised by a person brought up to a trade. Here, no training is required, and no apprenticeship. "Handicraft" means more than skilled labour: *City of London's* case(12); *Lowther v. Earl of Radnor*(13); *Beadon v. Parrott*(14); *R. v. Justices of County of Louth*(15); *Morgan v. London General Omnibus Co.*(16); and *Smith v. Associated Omnibus Co.*(17). In *Armstrong v. Maxwell*(18) the employees were mechanics engaged in creative work. *Erwin v. Strand Electric-lighting Co.*(19) shows that oiling machinery is not a handicraft. 5 10

The word "handicraft" carries with it the necessity "for trade or sale"—ss. 2, 25 (a): to include all kinds of manual labour, simply as manual labour, gives too unrestricted a meaning to "handicraft."

J. R. Marshall, in support. Section 64 of the Factories Act, 1921-22, does not apply. 15

The definition of "factory" in s. 149 of the Factory and Workshop Act, 1901 (Eng.), is used with a different connotation from the definition in the Factories Act, 1921-22, and in the corresponding Australian legislation: *Henry Bull and Co., Ltd. v. Holden*(20). "Adapting for sale of any article" in the English definition of "workshop" has, however, been correlated with "preparing goods for manufacture or sale," but here the work done does not amount to adapting or preparing: *Henry Bull and Co., Ltd. v. Holden*(21). If the work done on the trams is not adapting, it cannot be "preparing": *Grove v. Lloyds' British Testing Co., Ltd.*(22). 20 25

C. H. Taylor, for the respondent. The car-shed in which the workers are employed is a place in which one or more persons are (a) employed "in preparing . . . goods for trade"; (b) "employed directly or indirectly, in a handicraft"; and the place in which they are employed is brought within the definition of "factory" by reason of s. 64 of the Factories Act, 1921-22. 30

A. As to "preparing goods . . . for trade," see *Henry Bull and Co., Ltd. v. Holden*(23). What was done here has the effect of 35

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| (12) (1610) 8 Co. Rep. 121b, 130a; | (18) (1895) 13 N.Z.L.R. 636. |
| 77 E.R. 658, 671. | (19) (1899) 16 W.N. N.S.W. 49. |
| (13) (1806) 8 East. 113; 103 | (20) (1912) 13 C.L.R. 569, 573. |
| E.R. 287. | (21) <i>Ibid.</i> , 575. |
| (14) (1871) L.R. 6 Q.B. 718. | (22) [1931] A.C. 446, 467. |
| (15) [1900] 2 I.R. 714. | (23) (1912) 13 C.L.R. 569, 573, |
| (16) (1884) 13 Q.B.D. 832. | 576. |
| (17) [1907] 1 K.B. 916. | |

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altering the character of the tram-car so as to make it fit for trade —i.e., the next day's work. It is not denied that the cars are "goods." "Preparing" and "manufacturing" are not *ejusdem generis*(24): *Alderson v. Gold*(25) and *Bailey v. Potteries Electric Traction Co.*(26). What was done here, even if it was in the nature of a minor repair, was a preparation for the trade for which the tram-cars were intended to be used. The appellant Corporation conducts the "trade" of carrying passengers, and the cars are prepared in the tram-shed for this carrying trade: *Bailey v. Potteries Electric Traction Co.* (27), which overruled *Curtis v. Shinner*(28); and *Billingham v. New Zealand Loan and Mercantile Agency Co., Ltd.*(29). The work done in the tram-shed is "work ordinarily performed in a factory."

B. The work done in the tram-shed is a "handicraft" within the wider meaning that can be given to the word to include any manual occupation: 5 *Oxford English Dictionary*, Pt. I, 63 (manual skill, and included in trade or occupation); *Webster's New International Dictionary*, 978 (manual occupation); and 1 *Funk and Wagnall's New Standard Dictionary*, 1111. Here, the wider meaning should be given to effect the purpose of the statute: the word "handicraft" does not mean "handicraft for trade or sale," but the employment of persons actually engaged in manual labour for wages: *Armstrong v. Maxwell*(30) and *Robb v. Bullen*(31). On the facts, as found, s. 64 of the Factories Act, 1921–22, read in conjunction with the definition, brings the car-shed within the definition of "factory." The work done in the car-shed involves the inspection of cars before they are repaired in the workshop, so that part of the work of the workshop, which is admittedly a "factory," is "ordinarily performed" in the car-shed. Since some of the operations of the factory are carried on in the car-shed, the latter is brought within the definition: *Keddie v. South Canterbury Dairy Co.*(32). *Re Kelburn and Karori Tramway Co., Ltd.*(33), refers only to machinery, and results from the fact that the engineers were employed as such, and not in preparing goods for trade.

Weston, K.C., in reply. "Handicraft" must be placed in conjunction with "trade or sale," otherwise far-reaching results, which were not within the contention of the Act, would follow.

(24) *Ibid.*, 574.

(25) [1909] V.L.R. 219, 221.

(26) [1931] 1 K.B. 385, 494.

(27) *Ibid.*, 491, 496.

(28) (1906) 95 L.T. 31.

(29) [1914] V.L.R. 321.

(30) (1895) 13 N.Z.L.R. 636, 638.

(31) (1905) 25 N.Z.L.R. 258.

(32) (1907) 26 N.Z.L.R. 522, 525.

(33) (1936) 36 Bk. of Awards, 493.

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The Court should place an interpretation on the definition which will give a reasonable result. Although *Curtis v. Shinner*(34) was overruled, it was, in effect, restored by the reasoning in *Potteries Electric Traction Co. v. Bailey*(35). Section 64 applies only to buildings in which the operations of the factory are carried out. It could not be held that inspection of the cars at Thorndon can be part of the operation of the factory at Kilbirnie; the work is done at different times.

Cur. adv. vult.

The judgment of MYERS, C.J., and SMITH, J., was delivered by 10

MYERS, C.J. The question for determination on this appeal is whether the Magistrate was right in deciding that the appellant's car-shed at Kilbirnie is a "factory" within the meaning of the Factories Act, 1921-22.

It is not necessary to recapitulate the facts, which are fully 15 set out in the case stated by the Magistrate. It is sufficient to say at the moment that the Corporation has also a workshop at Kilbirnie which does come within the definition of a factory and is registered as such. That is to say, the work of manufacturing and equipping cars before they are placed on the road is all done 20 in the workshop, and the case states that all major repairs are also done there. The work done in the car-shed consists of and is confined to the inspecting, cleaning, and oiling of the cars, and the making of minor running-adjustments to the cars when from time to time they are brought into the car-shed for this purpose. 25 The proper inference seems to be that all the work done in the car-shed comes within the description of maintenance and minor repairs, not requiring skilled labour. The workshop is separated from the car-shed by a wall having one or two doors for access purposes. 30

First, we would express our respectful concurrence with the observation of *Griffith, C.J.*, in *Henry Bull and Co., Ltd. v. Holden*(1), the effect of which, applied to New Zealand, is that when we have to construe a New Zealand Act not framed upon an English Act, but having marked differences from the English 35 legislation on the same subject, it is better to have regard to our own law and not to be guided by what has been held to be the construction of different Acts framed in different language. The good sense of this observation is seen at once when it is pointed out that in the Factory and Workshop Act, 1901 (Imp.), 40

(34) (1906) 95 L.T. 31.

(35) [1931] A.C. 151, 163, 168.

(1) (1912) 13 C.L.R. 569, 573.

the expression "non-textile factory," which is comparable with the definition of "factory" in the New Zealand Act, means, *inter alia*,

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5 any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes—namely, (i) the making of any article or of part of any article; or (ii) the altering, repairing, ornamenting, or finishing of any article; or (iii) the adapting for sale of any article.

10 It will thus be seen that the English Act includes expressly the altering or repairing of an article, which elements if they come within the New Zealand definition of "factory" can do so only by implication.

In the New Zealand Factories Act, 1921–22, as subsequently
15 amended, "factory" is defined by s. 2 as meaning, in so far as it is material to the present case,

(a) Any building, office, or place in which one or more persons are employed, directly or indirectly, in any handicraft, or in preparing or manufacturing goods for trade or sale, and includes any building, office, or place
20 in which work such as is ordinarily performed in a factory is performed for or on behalf of any local authority whether for trade or sale or not."

Thus, if the car-shed in the hands of some person other than a local authority would come within the definition of a "factory" by reason of the operation therein consisting in preparing or manufacturing goods for trade or sale, it would still be a "factory" in the hands of the local authority if the same work were performed therein even though the goods in respect of which the work was done were not prepared or manufactured for trade or sale. We
25 propose therefore, in the first place, for the purpose of considering what seems to be the issue involved, to regard the car-shed as an establishment separate from the workshop, and to consider whether the work done therein brings the establishment within the definition of "factory."

A number of English and Scottish authorities were cited during
35 the argument, all of which we have examined, but none of which, for the reason that we have already given, seem to help in the elucidation of the question now calling for determination. The Australian cases, however, are helpful, because the statutory definition of "factory" there is in all material respects the same as our own. Thus, in *Henry Bull and Co., Ltd. v. Holden*(2) the
40 definition of "factory" which the High Court of Australia had to consider was

Any office, building, or place in which four or more persons are engaged directly or indirectly in working at any handicraft or in preparing or manufacturing articles for trade or sale.
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Griffith, C.J., said: "Without attempting to give an exhaustive definition of what the word 'preparing' means, I think it at any rate involves doing something to an article which has the effect of altering its character or condition in such a manner as to make it fit (if not already fit) or fitter (if already fit) for trade or sale, and is not satisfied by merely doing something with respect to an article that retains its original character and condition so as to make it more convenient to sell it, such as exposing it for sale, or marking its name or price upon it, or packing it after it has been sold"(3). *Barton, J.*, said: "The preparing is to be done with the object of trade or sale. Naturally preparation with such an object will render the articles fitter for trade or sale. But articles may be so rendered fitter without alteration in their structure or even in their individual appearance"(4). *Isaacs, J.*, said: "Preparing goods for sale I take to mean an act done to or in relation to the goods themselves which effects some alteration in their character or condition for the purpose of making them saleable at all, or of improving their chance of sale, or of obtaining a better price for them"(5).

The circumstances which the High Court was called upon to consider were very different from those in the present case. There the question was whether or not the warehouse of the appellants, who were importers and distributors of soft goods, in which goods when received were unpacked, ticketed, sold, and, when sold, repacked for delivery to purchasers, was a "factory" within the meaning of the statute, and the High Court held that it was not. It will be seen at once that the Court did not require to consider the difference between trade and sale. The whole object of the appellants was to trade and sell their goods. In the present case it is necessary to consider what is meant by the word "trade" in the definition, because admittedly no question of sale is involved. The view of the Magistrate—and the contention on behalf of the respondent—is that, in the car-shed, goods—i.e., the tram-cars—were "prepared for trade." The contention is that the cars brought in for maintenance or repair were brought in because without the work to be done on them in the car-shed they were unfit to go on running, and the work done in the car-shed prepared them for again running—i.e., for trading in the sense of carrying passengers.

We think that the short answer to the case is that the contention involves a misconception as to the meaning of "trade"

(3) (1912) 13 C.L.R. 569, 573.

(5) *Ibid.*, 576.

(4) *Ibid.*, 574.

in the definition. The question was dealt with by *Cussen, J.*, in *Billingham v. New Zealand Loan and Mercantile Agency Co., Ltd.*(6), where the learned Judge said: "The question, then, is whether what the defendant did comes under the words

5 " 'preparing articles for trade or sale.' With regard to the word " 'trade,' I do not think that the case is affected by its inclusion " in the subsection. I think it means in this case something " analogous to sale or barter "(7). We think that that is the correct view, and that the words "trade" and "sale" as used

10 in the definition are words *ejusdem generis*. But even if that is not so, we do not think that "preparing for trade" can include mere maintenance work, or repairs for the purpose of merely enabling an article, previously put into commission, to be continued in use, though the position may be quite different if

15 the purpose be to repair the article for resale or to be dealt with otherwise than merely to be kept in use as previously. On either view the respondent's contention fails.

But, says the respondent alternatively, if the persons in the car-shed were not employed in preparing or manufacturing goods

20 for trade or sale, they were still employed in a "handicraft," and for that reason the building is a factory. Now the term "handicraft," as used in the definition of "factory," came under consideration by Mr. Justice *Williams*, as long ago as 1895, in *Armstrong v. Maxwell*(8). The learned Judge held that the

25 term as used in the Act had no special technical meaning, but must be regarded as used in the popular sense. What the Court therefore has to do, he said, is to inquire whether, taking the word in its popular sense, it covers the occupation in which the persons in the particular establishment were employed. We respectfully

30 and entirely agree with the view expressed by Mr. Justice *Williams*. That being so, one has to consider the notion that is involved in the popular sense of the term "handicraft," and, in our view, it connotes a trade, or occupation, or vocation, involving skilled manual work. We use the word "trade" here in the

35 sense in which a parent would use it when saying that he was sending his boy to a trade, or to learn a trade. For example, it was said by *Palles, C.B.*, in *Reg. v. Justices of County of Louth*(9), that, in his opinion, a hairdresser was a "handicraftsman." In the present case the facts as stated by the Magistrate

40 show that the work done by those persons employed in the carshed, though of course manual work, does not involve skill in

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(6) [1914] V.L.R. 321.

(7) *Ibid.*, 325.

(8) (1895) 13 N.Z.L.R. 636.

(9) [1900] 2 I.R. 714.

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the sense that we have indicated. The case stated shows that in the course of two or three nights a person previously unacquainted with the work could obtain all the knowledge necessary for him to acquire in order to perform the work required of him. We think, therefore, that the respondent fails also in this contention. 5

It is further argued, however, on behalf of the respondent, that the case comes within s. 64 of the Factories Act, 1921-22, which section is as follows :—

Where the operations of a factory are carried on in several adjacent buildings, enclosures, or places, all of them shall be included as one and the same factory, notwithstanding that they may in fact be separated or intersected by a road, street, or stream, or by any building, enclosure, place, or space not forming part of the factory. 10

It is clear that that section has no application. It would apply only if there were carried on in the car-shed the operations of a factory, and, as we have already said, this, in our opinion, is not the case. Mr. *Taylor* referred to *Keddie v. South Canterbury Dairy Co.*(10), but, in our view, that case has no bearing. Mr. Justice *Chapman* there said, in reference to s. 61 of the Factories Act, 1901, which is in the same terms as s. 64 of the 1921-22 Act: "It is . . . probable that a Court would . . . have adopted a definition as wide as that given by s. 61 of the Act, which enacts that all the buildings, enclosures, and places treated as one factory in carrying on its operations shall be deemed one and the same factory, notwithstanding the intervention of a road, stream, or intermediate building not forming part of it"(11). The learned Judge was not giving the precise words of s. 61 of the statute, but he must be taken, we think, as expressing his view of the meaning of the section. If in this case none of the operations of a factory were being adopted in the car-shed, as in our opinion they were not, then we fail to see how s. 64 can have any application. 15 20 25 30

In our opinion, the Magistrate's decision was wrong; he should have dismissed the information. The appeal should be allowed, and the conviction quashed. 35

OSTLER, J. The question in this appeal is whether, upon the facts found by the learned Magistrate, the appellant Corporation's car-shed at Kilbirnie, in which only the work of the inspection, cleaning, oiling, and minor running-adjustments of its tram-cars is performed, is a factory within the definition of 40

(10) (1907) 26 N.Z.L.R. 522.

(11) *Ibid.*, 524-25.

"factory" contained in s. 2 of the Factories Act, 1921-22. That definition, so far as it is relevant, is

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Any building . . . in which one or more persons are employed
5 . . . in any handicraft, or in preparing or manufacturing goods for trade
or sale, and includes any building . . . in which work as is ordinarily
performed in a factory is performed for or on behalf of any local authority
whether for trade or sale or not.

Counsel for respondent admits that he cannot rely on the latter
part of the definition, for the reason that there is no finding of
10 fact in the case that the work performed in the car-shed is work
which is "ordinarily performed in a factory." Therefore, the
question for decision is narrowed down to this point: if no one
is employed in the car-shed in any "handicraft" or in "preparing
"goods for trade or sale," then the car-shed is not a factory.

15 A number of cases were cited on the meaning of the
word "handicraft," but it was decided forty-two years ago in
New Zealand that the word must be given its popular meaning:
per *Williams, J.*, in *Armstrong v. Maxwell*(12). That case has
stood unquestioned ever since, and I think, therefore, that we
20 should follow it on the principle of *stare decisis* even if not agreeing
with it. But, for my part, I think it was correctly decided. The
learned Judge in that case, however, did not attempt to give a
complete definition of the word, but the judgment, I think,
indicates that he considered that it meant skilled manual labour
25 —i.e., labour of a kind that could only be done by crafty or skilled
hands. That, I think, is the widest popular meaning which could
possibly be given to the word. It cannot be held to mean merely
manual labour. Giving it that wide meaning, on the facts found
in this case no one was employed in a handicraft in this car-shed.
30 Any man of ordinary intelligence could learn to perform any of
the work done there in two or three days, and there was no
necessity for a long period of training in order to acquire hands
skilled for the work. Therefore, in my opinion, there was no
handicraft carried on in the building.

35 The next question is whether anyone was employed
in "preparing goods for trade or sale," and this involves
the question as to what is meant by "preparing goods." Again
a number of cases were cited. The English cases are not much
in point, because the definition of "factory" in the English Act
40 does not contain these words and is widely different in its terms.
Some of the Australian States, however, have a similar definition
to ours, but none of the Australian cases cited was precisely in
point. It is manifestly impossible to give an exhaustive definition

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of the meaning of "preparing goods," but, in my opinion, the word "preparing" indicates some act done to the goods antecedent to the sale or the trading, and it cannot be held to apply to acts which have to be done again and again in order to keep goods fit for the purpose for which they were originally prepared. In other words, assuming that "goods" includes tram-cars, and assuming that "for trade" means "for use in trade," the work done in inspecting, cleaning, oiling, and making minor adjustments in order to keep those tram-cars fit for continual use does not, in my opinion, amount to "preparing" the goods for trade. Putting it in another way, work which is merely maintenance and minor running-repairs is not "preparing goods" within the meaning of those words as used in the Act. That was the opinion of the Court of Arbitration in a somewhat similar case in which a judgment was delivered by *Page, J.*, last year: see *In re Kelburn and Karori Tramway Co., Ltd.*(13). The question there was whether the power-house of the company, which contained the engine and machinery for drawing its cable-cars up and letting them down hill, was a factory. The engine was driven by electrical power taken direct from the city mains and neither generated nor transformed in the power-house. Three engineers were continuously employed, and their main duty was to run the engine and electrical plant, and also to keep them properly oiled, adjusted, and in good running-order. For that purpose the power-house was equipped with tools and implements, including a lathe, so that they could make and replace any new part that was required. It was held, nevertheless, that the power-house was not a factory, because the adjusting and making and fitting of new parts was merely incidental to their work as engineers of superintending and controlling the running of the engines. The case is not exactly in point, because no one was employed in that case in a full-time job of maintenance. But, nevertheless, it does decide, and I think rightly, that maintenance of machinery cannot be included in the words "preparing goods."

Counsel for respondent relies on a passage in the judgment of *Griffith, C.J.*, in *Henry Bull and Co., Ltd. v. Holden*(14). In that case the question was whether the appellant company's premises were a factory within the meaning of that term in the New South Wales Factories and Shops Act, 1896. That depended upon whether persons were employed in those premises in "preparing articles for trade or sale." *Griffith, C.J.*, said: "Without attempting to give an exhaustive definition of what

(13) (1936) 36 Bk. of Awards, 493.

(14) (1912) 13 C.L.R. 569.

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- “the word ‘preparing’ means, I think it at any rate involves
“doing something to an article which has the effect of altering
“its character or condition in such a manner as to make it fit
“(if not fit already) or fitter (if already fit) for trade or sale, and
5 “is not satisfied by merely doing something with respect to an
“article that retains its original character and condition so as
“to make it more convenient to sell it, such as exposing it for
“sale or marking its price or name upon it, or packing it after
“it has been sold”(15). In that case the appellant company
10 was a wholesale soft-goods warehouseman, and the work done on
its premises was to unpack the goods received, label them, and,
when sold, repack them for delivery. The passage quoted does
not, I think, assist respondent’s argument, for the learned Chief
Justice was there considering the preparation of goods antecedent
15 to sale, and his words must be read in the light of the subject
with which he was dealing. The question of maintenance of
vehicles used in a carrying trade was not present in his mind.
Nor is it dealt with in the other Australian cases cited—
viz., Billingham v. New Zealand Loan and Mercantile Agency
20 *Co., Ltd.*(16), and *Alderson v. Gold*(17). But the former case
does seem to show that the learned Judge who decided that case
thought that the preparation must refer to acts done to the goods
antecedent to sale or trade. I have no doubt that this is the
correct construction of the word, and that the acts done in this
25 car-shed were not the preparing of goods. Having come to this
conclusion, it is unnecessary to decide the precise meaning of the
words “for trade,” and I, accordingly, express no opinion on
that point.

- The last question is whether, as contended on behalf
30 of respondent, this car-shed, if not otherwise a factory, is never-
theless brought within the terms of the Act by virtue of
the provisions of s. 64. That section provides that:

- Where the operations of a factory are carried on in several adjacent
buildings . . . all of them shall be included as one and the same
35 factory, notwithstanding that they may in fact be separated or intersected
by a road, street, or stream, . . .

- It is contended that, as the tram-cars are inspected in the car-
shed in order to ascertain whether they are in need of repairs
which would have to be effected in the factory on the other side
40 of the wall, and as such inspection is one of the operations of a
factory, and as the car-shed is an adjacent building, it must be
deemed to be included as part of the factory. The argument is

(15) *Ibid.*, 573.

(16) [1914] V.L.R. 321.

(17) [1909] V.L.R. 219.

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ingenious, but, in my opinion, unsound. The operation of inspection performed in the car-shed, as I have already held, is not one of the operations of a factory, but a necessary preliminary operation in the work of keeping the tram-cars in good running-condition, which work does not bring the car-shed within the definition of a factory. Before the provisions of s. 64 can be invoked, it must be shown that the operations of a factory are carried on in the car-shed. If they are not, as I have held, then s. 64 has no application. The case of *Keddie v. South Canterbury Dairy Co.*(18), relied on by counsel for respondent, is distinguishable, because there the office which was held to be part of the factory was in fact being used as part of the factory. 5 10

For the reasons given, I agree that the appeal should be allowed.

FAIR, J. The question to be decided in this appeal is whether three tram-car sheds at Thorndon, Newtown, and Kilbirnie, in the City of Wellington, owned and used by the appellant Corporation, are "factories" within the definition of "factory" in s. 2 of the Factories Act, 1921-22. The facts under which the question arises are simple, and are set out, in detail, in the case stated on appeal. They may be broadly stated as follows: The sheds are used mainly for housing tram-cars owned by the appellant Corporation when such cars are not in use. While they are so housed, they are inspected, cleaned, and any incidental minor adjustments or replacements needed are done. This work is done at night, and is not "skilled" work in the sense in which that word is ordinarily used. "Skill," in accordance with the only definition given in the *Shorter Oxford English Dictionary*, Vol. 2, 1906, that is not archaic or obsolete, means "practical knowledge in combination with ability; cleverness; expertness." On the facts as set out it seems clear that no worker doing this work would claim that it requires special ability, cleverness, or expertness, and the word "skill" connotes each one of those ideas. The work done is simple, straight-forward work, capable of being done by anyone of ordinary intelligence after one to three nights' explanation and experience of the various matters that require attention. 15 20 25 30 35

It is clear also that none of the car-sheds is a "factory" in the ordinary or popular meaning of that word. The only question is whether they, or any one of them, falls within s. 2 (a). 40

"Factory" is defined in that section, as amended, in terms which, so far as they are relevant, are as follows:—

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- 5 (a) Any building, office, or place in which one or more persons are employed, directly or indirectly, in any handicraft, or in preparing or manufacturing goods for trade or sale, and includes any building, office, or place in which work such as is ordinarily performed in a factory is performed for or on behalf of any local authority whether for trade or sale or not;
- 10 (b) Every bakehouse (meaning thereby any building or place in which any article of food is baked or prepared for baking for sale for human consumption); and also
- 15 (c) Every building or place in which steam or other mechanical power or appliance is used for the purpose of preparing or manufacturing goods for trade or sale, or packing such goods for transit; and also
- (d) Every building or place in which electrical energy is generated or transformed as an illuminant or a motive power for trade or sale, or in which coal-gas or any other form of gas is produced for the like purposes; and also
- 20 (f) Every building or place in which any Asiatic is directly or indirectly employed or occupied in laundry-work or any other handicraft, or in preparing or manufacturing goods for trade or sale, or in packing them for transit.

The first matter to be considered is whether persons employed in the work described are employed in any "handicraft." The word "handicraft" would not be commonly used to describe work of this kind. "Handicraft" is defined in the *Oxford*
25 *Dictionary* as "manual skill; skilled work with the hands." A secondary meaning is given, "a manual art, trade, or occupation." The illustrations of the use of the word given under the secondary meaning show, however, that it also was intended to include skill; and suggest that it includes skill, the acquisition of which would
30 require a considerable time. There can, I think, be no doubt that its ordinary and natural use implies this, and a manual labourer performing work that required no special skill would not be described by anyone as practising a handicraft. In its ordinary acceptance the use of the word implies more skill than
35 is called for in a simple manual occupation. This view is confirmed by the use of the words "preparing or manufacturing "goods for trade or sale," which implies that such work is not a handicraft, and by the decisions in *The City of London*(19) and in *Lowther v. Earl of Radnor*(20). Mr. *Taylor* relied on a
40 passage in Mr. Justice *Williams's* judgment in *Armstrong v. Maxwell*(21), where in construing the word "handicraft" in the corresponding section in the Factories Act, 1894, he says: "The "Act was intended to protect persons who are employed in manual "labour for wages"(22). But that was a general statement
45 as to the general purposes of the Act. The facts of the case were

(19) (1610) 8 Co. Rep. 121b, 130a; (21) (1895) 13 N.Z.L.R. 636.
77 E.R. 658, 671. (22) *Ibid.*, 638.
(20) (1806) 8 East. 113, 124; 103
E.R. 287, 291.

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set out in detail in the judgment, and, the learned Judge having held that the workers were employed in a "handicraft," a precise definition of the meaning of the word "handicraft" was not necessary. The work done is, in my view, not the exercise of a handicraft within the popular meaning of that word, which is the meaning to be attached to it in the section.

It then has to be considered as to whether the workers are employed in "preparing goods for trade or sale." Mr. *Taylor* admitted that he could not rely on the latter part of para. (a), which makes the building a factory within the definition where the work is performed for or on behalf of any local authority whether the preparation is for sale or not. It is a condition of the application of this limited definition that it must be shown that the building in which the work, such as it is ordinarily performed in a factory, is done for the local authority. There was no evidence before the Magistrate that this class of work is ordinarily performed in a factory. But, as appears from the later passages in this judgment, I do not think that such evidence would make any difference. Nor does Mr. *Taylor* rely on the word "manufacturing."

It is certain that some limitation must be placed upon the widest meaning of the word "preparing." The cleaning of the exterior and interior of the tram-cars necessitated by their use during the day plainly would not be within the intention of the definition; nor would the oiling of the cars according to the daily or usual routine. Those acts would fall within the literal meaning of "preparing" of cars for use, but it would be absurd to suggest that they, if performed, would make the building where they were done a "factory" within the meaning of the definition. The doing of minor running-repairs, adjustments, and replacements seems to approximate in its nature to such routine work. This work is for the purpose of ensuring the efficient running and maintenance of the cars. It is for the purpose of making the cars "fit or fitter" for service, but it is not initial work for that purpose. The act of preparation generally implies something different from an act done in order to enable the use of something already operating to continue. It generally connotes an initial preparation. In relation to the goods themselves it implies something done in order to put them into condition for use, and does not normally include minor renewals or adjustments usually described as "running-repairs." This type of work is "maintenance" of the vehicle as defined in the judgment of *Scrutton, L.J.*, in *Bailey v. Potteries Electric Traction Co., Ltd.*(23). It is

far from clear that such work falls within the meaning intended to be attached to the word "preparing" in the Act, or within the general scope or spirit of the Act, or the mischief that it was intended to provide against. But it seems certain that the
 5 ordinary maintenance of movable plant, including vehicles which are propelled as these trams are, is not "preparing" such plant for use in the ordinary and natural meaning of that word.

If there were anything in the circumstances under which the work was done, or in the Act itself which showed that the wider
 10 meaning should be given to the word, that meaning could be adopted, but nothing of this kind appears. The terms of paras. (b), (c), (d), and (f) of s. 2 indicate that the word there primarily refers to the initial preparation and to acts other than those of current maintenance. This being so, the acts in question
 15 cannot be held to be acts of the kind contemplated by the definition.

I have considered all the cases cited. The balance of authority, in my opinion, supports the view I have expressed. The dictum of Sir Samuel Griffith, C.J., in *Henry Bull and Co., Ltd. v. Holden*(24), which was relied on by the learned Magistrate, must
 20 be read *secundum subjectam materiam*, and this dictum cannot, I think, be considered as directly applicable, or indeed of any real weight, with reference to the circumstances of the present case which differ so widely from those considered by the High Court in that case. In reading general statements contained in
 25 judgments, they must be understood in the light of the particular instance and facts which the Court had in mind in making them. The same principle is to be applied to them as has been held to be applicable to the construction of the definition in the present case.

It may be that the words "for trade" in the definition should
 30 have the meaning attached to them by *Cussen, J., in Billingham v. New Zealand Loan and Mercantile Agency Co., Ltd.*(25), as being something in the nature of sale or barter. But as this may prove to be a question of importance in some later case and, in my view, may involve a detailed consideration of the judgments
 35 in *Potteries Electric Traction Co., Ltd. v. Bailey*(26), I prefer to refrain from forming an opinion upon it; or upon the cognate question as to whether the carrying-out of major repairs by other than "handicraftsmen" would constitute "preparing for trade."

It was also contended on behalf of the respondent that at
 40 least the car-shed at Kilbirnie, which is separated from the car-workshop by merely the wall, in which there are two doors, was a factory by virtue of the provisions of s. 64 of the Act.

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(24) (1912) 13 C.L.R. 569, 573.

(25) [1914] V.L.R. 321, 325.

(26) [1931] 1 K.B. 335; rev. on
 app. [1931] A.C. 151.

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That section provides as follows :—

Where the operations of a factory are carried on in several adjacent buildings, enclosures, or places, all of them shall be included as one and the same factory, notwithstanding that they may in fact be separated or intersected by a road, street, or stream, or by any building, enclosure, place, or space not forming part of the factory.

With regard to the factories at Thorndon and Newtown, it is quite clear that they cannot be regarded as adjacent buildings within the meaning of this section as one is some two miles away and the other some three or four. The terms of the section indicate that it applies to buildings, &c., less widely separated than this.

With regard to the Kilbirnie car-shed, Mr. *Taylor* contended that the inspection carried out in the car-shed was part of the repair work done in the workshop as it was essential in order to enable that work to be done; and that, as the workshop was a factory and part of its operations were being carried out in the car-shed which was adjacent, the car-shed was by virtue of s. 64 part of the workshop, and so a factory. This very ingenious argument does not appear to me to be sound. The Kilbirnie car-shed is "adjacent" to the workshop within the meaning of the section. But there is no evidence, nor is it likely, that the inspection by the adjusters and cleaners in the car-shed is any part of the work to be carried out in the workshop. It is probable that the workers who inspect in the car-shed inform the workers in the workshop of the repairs, adjustments, or other work that they consider requires attending to. There is no evidence that they give full details of what is discovered on their inspection. It is more probable that they give merely a general statement. But whichever is the case, this inspection is for the purpose of determining what work should be done by the workshop. It may be useful in indicating to the workshop the parts of the tram which do not require inspection, although even this is doubtful. It does not obviate the necessity for a thorough inspection by those workers who are actually to carry out the work, and cannot, therefore, be regarded as part of the work done for or in the course of the operations of the workshop.

For these reasons I am of opinion that none of the car-sheds is within the meaning of the Factories Act, 1921-22, and that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellant: *The City Solicitor* (Wellington).

Solicitors for the respondent: *The Crown Law Office* (Wellington).

AUCKLAND HARBOUR BOARD v. AUCKLAND FARMERS' FREEZING COMPANY, LIMITED.

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OSTLER, J.

Local Authorities—Public Bodies' Leases—Powers of Leasing Authority, upon Surrender of a Lease, to Grant new Lease with Rights of Renewal—Public Bodies' Leases Act, 1908, ss. 5, 12.

A leasing authority under the Public Bodies' Leases Act, 1908, upon the surrender of a lease, has power under s. 12 of that Act to grant a new lease of the premises to the same lessee for the remainder of the term, whether that remainder exceeds twenty-one years or not; and to include in the new lease any such right of renewal as it is authorized to grant by s. 5 of the same statute.

Sargood v. Wellington Harbour Board(1) applied.

(1) (1905) 25 N.Z.L.R. 268; 7 C.L.R. 583.

ORIGINATING SUMMONS under the Declaratory Judgments Act, 1908, for a declaration as to whether the Auckland Harbour Board had statutory power to accept a surrender of a lease of land from the Auckland Farmers' Freezing Co., Ltd., and to grant
5 a new lease to that company upon certain specific terms.

The Auckland Harbour Board, a leasing authority under the Public Bodies' Leases Act, 1908, on June 18, 1908, leased certain land vested in it to the company for a term of fifty years from March 1, 1918. As to a part of that land the lease had since been
10 surrendered, but as to the balance the lease was in full force and effect, and it was due to determine on February 28, 1968. On the same date, the Board leased other land vested in it to J. J. Craig, Ltd., for a similar term, and that lease until February 28, 1968, was vested in the company at the time of the issue of
15 the summons. On December 4, 1923, the Board leased to the company certain other land for a term to expire on February 28, 1968.

It was proposed by the Board and the company that the company should surrender these three leases, and that the

PUBLIC BODIES' LEASES ACT, 1908, s. 12 (1) (d).—On the surrender of a lease (whether with respect to the whole or to any part of the land comprised therein), grant to the lessee, or to any other person or persons with the consent of the lessee (without offering the same for sale by auction or tender), a new lease or new leases of the whole or any part or parts of the land comprised in the surrendered lease for the remainder

or any part of the remainder of the term of the surrendered lease, at such rent as the leasing authority determines, and with such provisions as are authorized by this Act and as the leasing authority thinks fit, including therein, if the leasing authority thinks fit, such right of renewal, or of having a new lease offered for sale by auction, as is consistent with the provisions of section five of this Act.

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Board should grant it a new lease of the lands comprised therein for a term equivalent to the remaining balance of the term of these leases—i.e., to February 28, 1968—with a right to the company to obtain a renewed lease of the land in accordance with the Second Schedule to the Public Bodies' Leases Act, 1908, for a further period of seventeen years, and so on from time to time, but so that the total number of such renewals of seventeen years each should not exceed three, and so that the last of them should not extend beyond February 28, 2019. The question was whether the Board had statutory authority to do this.

Barrowclough, for the plaintiff.

North, for the defendant.

Cur. adv. vult.

OSTLER, J. The authority of the Board is to be found in the Public Bodies' Leases Act, 1908, and, in my opinion, that Act does give it the necessary authority. Section 12 (1) (a) provides that a leasing authority may accept on such terms and conditions as it may think fit a surrender of any lease. Section 12 (1) (d) provides that on the surrender of a lease the leasing authority may

grant to the lessee . . . (without offering the same for sale by auction or tender), a new lease . . . of the land comprised in the surrendered lease for the remainder . . . of the term of the surrendered lease, at such rent as the leasing authority determines, and with such provisions as are authorized by this Act and as the leasing authority thinks fit, including therein, if the leasing authority thinks fit, such right of renewal, or of having a new lease offered for sale by auction, as is consistent with the provisions of section five of this Act.

If the latter part of the paragraph is carefully read, it will be observed that it is not the provisions of the lease which *are* to be consistent with the provisions of s. 5, but the right of renewal or of having a new lease offered for sale by auction which *is* to be consistent with the provisions of s. 5. The use of the word "is" in the singular shows plainly that this was the intention of the draftsman. The grammatical construction of the paragraph is plain and unambiguous. Parliament has plainly said that, when a lease is surrendered and a new lease granted for the remainder of the term of the old lease, the leasing authority may grant such right of renewal, &c., as is consistent with the provisions of s. 5. That can only refer to the provisions of s. 5 as to rights of renewal, and it is to the terms of s. 5 dealing with rights of renewal that one must look in order to determine whether the rights proposed to be granted in this case are authorized.

Section 5 provides for the kinds of lease which a leasing authority is authorized to grant. If the original term is for not more than twenty-one years, it may grant perpetual renewals for not longer than the same term so long as at the beginning of each renewal the rent is fixed by valuation under the provisions of the First Schedule, or the lease is offered by auction under the provisions of the Second Schedule; and it may limit the number of renewals. But if the term of the original lease is longer than twenty-one years, the leasing authority has no right to grant renewals except under s. 5 (d), in which case the aggregate term of the lease and any renewals must not exceed fifty years. The last words of s. 12, however, refer not to the kinds of lease mentioned in s. 5, but to the rights of renewal mentioned in the section. The section plainly gives power to grant such renewals as are provided for by s. 5.

It has been pointed out that the effect in this case will be the same as though a new lease were granted for a term of thirty years with three rights of renewal for an aggregate term of more than fifty years. Under s. 5 a leasing authority has no power to grant such a lease in the first place. The answer to that objection is, I think, that Parliament has provided in clear terms that upon the surrender of a lease the leasing authority can grant a new lease of the premises to the same lessee for the remainder of the term, whether that remainder exceeds twenty-one years or not, and may include in the new lease any such right of renewal as it is authorized to grant by s. 5. It is true that the effect of this construction is that a leasing authority could grant a lease for fifty years, and then, after the lease had run, say, two years, accept a surrender and grant a new lease for forty-eight years with perpetual rights of renewal. But, in my opinion, the words of s. 12 are so plain that I must adopt that construction. It is not a case of ambiguity at all. But, seeing that at each renewal the rent must be adjusted in accordance with the terms of the proposed lease, I cannot see that the public interest will suffer in any way because of the inclusion of the three rights of renewal in this case. To hold that in accepting a surrender of these leases and in granting a new lease for the remainder of the term the Board had no right to include any right of renewal would be to ignore the plain words of s. 12.

If the question is investigated historically, to my mind the intention of the Legislature is as clear as the words of s. 12 indicate. In *Sargood v. Wellington Harbour Board*(1) it was held that a

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(1) (1905) 25 N.Z.L.R. 268; 7 G.L.R. 583.

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leasing authority had power to accept the surrender of a lease and to grant a new lease to the lessee for the remainder of the term, including rights of renewal from time to time. At that time the Act in force was the Public Bodies' Powers Act, 1887, as amended by the Amendment Act of 1891. Those Acts were consolidated as the Public Bodies' Leasing-powers Act, 1908. That Act contained express power to accept a surrender and grant a new lease to the same tenant for the remainder of the term, but no express power in doing so to include renewals. Nevertheless, it was held that a leasing authority had such power. Then the Legislature by s. 12 of the Public Bodies' Leases Act, 1908, in clear language provided that, in granting a new lease for the remainder of the term to a tenant who had surrendered his lease, the leasing authority should have power to include such rights of renewal as were consistent with the rights of renewal provided for in s. 5.

For the reasons given, I declare that the Board has authority to accept a surrender of these leases from the company, and to grant it a new lease of the land with the rights of renewal proposed.

Declaration accordingly.

Solicitors for the plaintiff: *Russell, McVeagh, Macky, and Burrowclough* (Auckland).

Solicitors for the defendant: *Earl, Kent, Massey, and North* (Auckland).

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Rating—Rateable Property and Exemptions—School carried on exclusively for Pecuniary Gain or Profit—Whole Control entrusted to Creditor of School for payment of his Debt—Rating Act, 1925, s. 2 (g).

Where a company owning a school has entrusted its whole control to its creditor in order that he may be paid and the school enabled to continue so long as the debt and the control last, it is carried on for the pecuniary gain or profit of such creditor. Consequently, the land and buildings used for the purposes of the school are not exempt from rates under s. 2 (g) of the Rating Act, 1925, as "lands and buildings used "for a school not carried on exclusively for pecuniary gain or profit."

This conclusion cannot be disturbed because the company has obtained such an Order in Council as is authorized under s. 31 of the Companies Act, 1933, in respect of an association formed for promoting commerce, art, science, religion, charity, or any other useful object, and intending to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members.

Mayor, &c., of Christchurch v. Riddell(1) applied.

Christchurch City Corporation v. Christ's College(2) distinguished.

(1) (1914) 34 N.Z.L.R. 226; 17 G.L.R. 159. (2) [1920] N.Z.L.R. 662; G.L.R. 449.

ACTION for recovery of rates.

The defendant company carried on a school, and the rates sued for were in respect of the land and buildings used for the purposes of the school.

- 5 It was contended for the defendant company, but was denied by the plaintiff Corporation, that the school was "not carried on "exclusively for pecuniary gain or profit," and was consequently exempt under s. 2 (g) of the Rating Act, 1925. This was the sole question in controversy.
- 10 The history of this school so far as it seemed material was as follows :—

In 1921 a company, called King's Preparatory, Auckland, was formed with a capital of £100. It acquired from Mr. Charles Thomas Major at the price of £20,000 the property in Remuera,
- 15 Auckland, upon which the school had since been carried on. None of this £20,000 had been paid to Mr. Major, but he had regularly received interest thereon, at first at 6 per cent. per annum but later at 5 per cent. In 1930 King's Preparatory, Auckland, took title from Mr. Major and gave him a registered mortgage for £20,000
- 20 at 6 per cent. The due date for repayment of the principal sum was May 31, 1935. This mortgage had never been rearranged,

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and was overdue. Later, Mr. Major advanced to the company to meet its needs further sums of £3,000 and £2,000. This brought the debt due to him up to a total of £25,000. When in 1935 the mortgage fell due, the company was unable to pay Mr. Major. He was not agreeable to renew the mortgage, and said he wished the liability reduced as he had another use for the money. There had been discussion as to what would happen if the mortgaged property came back into his hands, and he said if that happened he would close the school and cut the property up. Ultimately, as Mr. Major put it in cross-examination, he was promised financial control "in the interests of the school" and certain alterations in the management provisions "for the sake of the "school, not for my own sake." In 1936 the company was reconstructed.

The present defendant company was formed under s. 31 of the Companies Act, 1933. It had a capital of only £10, divided into two hundred shares of 1s. each. Of this capital £9 7s. had been paid. It took over the assets and liabilities of the old company, including the liability of that company to Mr. Major for £25,000. It executed a deed of covenant whereby it became directly liable to Mr. Major for the payment of the moneys secured by the mortgage, and the performance of the covenants, conditions, and agreements therein expressed or implied. In respect of the £5,000 it executed a debenture. This debenture secured interest at 6 per cent. The capital sum of £5,000 was expressed to become due—

1. If an order is made or an effective resolution is passed for the winding-up of the company.

2. If the company makes default for six calendar months in the payment of any interest hereby secured and the registered holder before such interest is paid by notice in writing to the company calls in the said principal sum.

3. If judgment is obtained against the company on any account or if a distress or execution either by writ or appointment of receiver is levied on any part of the property or assets hereby charged, and such judgment unless an appeal is lodged in respect thereof or the debt for which such levy is made or receiver appointed is not satisfied within twenty-eight days after the date of such judgment or the date of such distress or execution being levied as the case may be.

Mr. Major had subsequently lent the present defendant company a further £1,000 without security, so that there was owing to him a total capital sum of £26,000 at the time of the hearing.

Paragraph III of the memorandum of association of the present defendant company expressly prohibited the members from participating in any profits that might accrue to the company, and provided that the surplus profits (if any) should be devoted by the

governors to "school purposes" or set aside for such school purposes, of which examples expressed to be not exhaustive were given.

The further facts sufficiently appear from the judgment.

Stanton, for the plaintiff.

5 *Gray*, for the defendant.

Cur. adv. vult.

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- CALLAN, J. [After stating the facts, as above:] There are lengthy provisions as to the management of the school, some of which appear in the memorandum, and not merely in the articles.
- 10 The effect of these provisions is that so long as any moneys remain owing to Mr. Major or his estate, whether upon the security of any mortgage, debenture, or otherwise, the board of governors is to consist only of Mr. Major, or his representative or successor, and the Bishop for the time being of the Diocese of Auckland of
- 15 the Church of England. Of these two, so long as any money shall be owing to Mr. Major or his estate, Mr. Major, his representative or successor, is to be the managing governor, and as such the chairman of all meetings of governors, with the casting-vote of a chairman. As to shares, there are twenty founder's shares and one
- 20 hundred and eighty ordinary shares. Mr. Major owns one of the founder's shares and all the one hundred and eighty ordinary shares, and Mr. Major or his successor is entitled to retain the ownership of these one hundred and eighty ordinary shares so long as any moneys are due to him or his estate. When the debt to
- 25 Mr. Major has been paid in full, but not until then, a new board of governors of nine members is to come into existence. Mr. Major, his representative or successor, will be one of the nine, but will no longer be able to control the board. When the debt has been paid in full, but not until then, the governors are to have the right
- 30 to call upon the executors or administrators of Mr. Major, or his successors for the time being, to transfer such shares as shall then be registered in the name of Mr. Major, or his successor, to such person or persons as the governors may direct.

- The provisions as to management and as to shares appear to
- 35 have been carefully and effectively contrived so as to preserve to Mr. Major, or his appointed successor or personal representative, complete control of the school so long as any part of the debt of £26,000, or any debt subsequently incurred to Mr. Major or his estate, remains owing. This appears to be entirely fair and reason-
- 40 able having regard to the fact that Mr. Major is the person who has provided the material resources to enable the school to come into being and to continue its existence.

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But the question for decision is what effect these provisions have on the claim that the school is exempt from rates under s. 2 (g) of the Rating Act, 1925.

The claim for exemption is founded on the circumstance that the memorandum does not permit any member to participate in profits, but requires all surplus profits to be applied to school purposes. It is further contended that the moneys due to Mr. Major are mere debts, and that in paying him the capital and interest due to him the company is not distributing profits; that there are no profits until debts be paid. I have come to the conclusion that this argument cannot be accepted, and that the proper way of looking at the matter is that contended for by Mr. Stanton. The leading authority upon that aspect of s. 2 (g) which has to be considered in this case is the decision of the Court of Appeal in *Christchurch City Corporation v. Christ's College*(1). 5 10 15

The argument which Mr. Gray submitted for the school is, I think, open to the criticism that it is based on certain illustrative references to "profits," "surplus," and "deficit" which occur in the course of the Court of Appeal judgment, while it ignores the substance of the test laid down by the Court of Appeal. That test was expressed to be: "Into whose coffers would the sum go which is "saved by the non-payment of rates?" The answer to that question in this case is, in my opinion, that the sum saved would go to Mr. Major or his estate, unless he or it voluntarily chose to allow it to go to school purposes. If this school be exempt from rates, its annual expenses will be reduced, and every reduction in its expenses increases the chance that this large debt will ultimately be paid in full, or at the very least accelerates the time when that will happen. Until that has been accomplished, the company has deliberately entrusted the whole control of the school to its creditor in order that he may be paid and the school enabled to continue. In the meantime the school is being carried on in order to pay him. When he has been paid, it is to be carried on in order that the work of the school may be maintained, improved, or enlarged. This way of looking at the matter concerns itself only with what is to become of the money—results of carrying on, and ignores the fact that a motive actuating Mr. Major and his associates has been, is, and will continue to be an altruistic motive—namely, the creation and continuance of a school of a particular kind. But that has been declared to be the proper way for a Court to look at these questions—e.g., *Mayor, dec. of Christchurch v. Riddell*(2). 20 25 30 35 40

(1) [1920] N.Z.L.R. 662; G.L.R. 449. (2) (1914) 34 N.Z.L.R. 226; 17 G.L.R. 159.

I am unable to accept Mr. *Gray's* argument founded on the references to "profits," "surplus," and "deficits" in the Court of Appeal judgment in the *Christ's College* case(3) for this reason: When that judgment is read as a whole it is, I think, plain that the

5 Court was there concerned to explain that a school may be carried on for "profit," although its operations are for the time being resulting not in a "surplus" but in a "deficit." An institution may be commercial in character and may have gain as its object, although for the time being it is being carried on at

10 a loss. In normal circumstances it would not be proper to say that a venture is being carried on for the "gain" of its creditors, or that the payment of money to its creditors out of its earnings is the distribution of any of its profits. But when an unsuccessful venture falls under the control of its creditors and is continued in

15 the hope of paying its debts, a different and abnormal position arises.

In this case the company never had any capital beyond the £9 7s., being the portion of its nominal capital of £10 which was paid. Yet it commenced its existence owing Mr. Major £25,000 ;

20 and, from the first, submitted itself to his sole control so long as it should owe him any money, plainly because submission to this control was essential to its birth and to its chance of survival. In my opinion, while the debt and the control last, the school which this company carries on is being carried on for Mr. Major's

25 pecuniary gain or profit. It follows that while it is carried on for that purpose, it is not exempt under s. 2 (g), as authoritatively interpreted by the Court of Appeal. This conclusion cannot be disturbed because the company has obtained such an Order in Council as is authorized under s. 31 of the Companies Act, 1933,

30 in respect of an association formed for promoting commerce, art, science, religion, charity, or any other useful object, and intending to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members.

Judgment for plaintiff Corporation for the amount claimed

35 in the writ—namely, £197 10s. 6d.—together with costs as per scale, and disbursements as fixed by the Registrar.

Judgment for plaintiff.

Solicitor for the plaintiff: *J. Stanton* (Auckland).

Solicitor for the defendant: *T. H. Dawson* (Auckland).

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WEBB v. BUCKLEY DRAINAGE BOARD.

Land Drainage—Right of Board to Order removal by Occupier of Obstruction in Private Drain—Land Drainage Act, 1908, ss. 62, 65—Land Drainage Amendment Act, 1913, s. 7—Finance Act, 1933 (No. 2), s. 47.

Section 62 of the Land Drainage Act, 1908, as amended by s. 7 of the Land Drainage Amendment Act, 1913, applies to *private drains* within the district of a Drainage Board, which is a local authority for the purpose of the said s. 62, or within one mile beyond the boundary of that district specified in s. 62 (1).

Moutoa Drainage Board v. Easton(1) considered.

(1) [1937] N.Z.L.G.R. 44.

ORIGINATING SUMMONS under the Declaratory Judgments Act, 1908, for an order determining whether the powers conferred upon a local authority under s. 62 of the Land Drainage Act, 1908, as amended by s. 7 of the Land Drainage Amendment Act, 1913, may be exercised by a Drainage Board in respect of private drains within or beyond its district. 5

The plaintiff was a farmer at Koputaroa, and a ratepayer within the district of the defendant Board. A private drain on the plaintiff's land connected with another private drain on the land of an adjoining owner or occupier, one Dora Isabel Law, of Koputaroa, married woman. The drain on the adjoining land connected with drains giving outlet to the Manawatu River and the Koputaroa Stream. Mrs. Law was not a party to this case and was not bound by any fact stated herein. It was to be assumed, however, for the purposes of this case, that Mrs. Law had permitted the drain on her property to become obstructed so as to impede the free flow of water from the plaintiff's land, and that she had refused to remove the obstructions. 10 15

Pursuant to s. 63 of the Land Drainage Act, 1908, the plaintiff, by a notice in writing dated June 15, 1937, requested the defendant Board to exercise the powers conferred upon local authorities under s. 62 of the Act, as amended by s. 7 of the amending Act of 1913, by ordering the said Mrs. Law to remove the obstructions from the private drain on her property. The defendant Board declined to exercise those powers. It contended that, in the present state of the statute-law and the decided cases, it had no authority to exercise such powers in respect of private drains. 20 25

L. G. H. Sinclair, for the plaintiff.

E. T. Moody, for the defendant.

SMITH, J. [After stating the facts, as above:] The Land Drainage Act, 1908, deals with both public and private drains. Prior to the passing of s. 47 of the Finance Act, 1933 (No. 2), in substitution for s. 25 of the Land Drainage Act, 1908, a Drainage Board was liable to private owners or occupiers for its default in performing the duties imposed upon it in respect of public drains—that is, those vested in the Board or under its management. On the other hand, the Drainage Board had (and still has) the power conferred by s. 23 of the Act to make private drains through private lands and to charge the expenses to the separate owners; and also the power conferred by s. 50 of the Act to make by-laws providing for the cleansing, maintenance, and repair of private drains by the owner or occupier of the land through which the same were made, and for the execution of such work by the Board in case of default, and the recovery of the cost thereof from such owner or occupier: see *Wood v. Taranaki Electric-power Board*(1) and *Thompson v. Wakapuaka Drainage Board*(2). The question which now arises is whether a Drainage Board has an additional power of control over owners or occupiers in respect of private drains—namely, whether it can invoke the provisions of s. 62 in respect of private drains. If s. 62 so applies, then, pursuant to s. 63 of the Land Drainage Act, 1908, the plaintiff was entitled to request the Drainage Board to exercise the powers, conferred by s. 62.

The answer to the inquiry depends, first, on whether a Drainage Board is a local authority for the purposes of s. 62; and, secondly, if it is, on whether it can exercise the powers conferred by s. 62 in respect of private drains.

Section 60 of the Act defines a "local authority" as meaning, *inter alia*, and "if not inconsistent with the context" a Drainage Board. Section 62, as amended by s. 7 of the Land Drainage Amendment Act, 1913, is as follows:—

62. (1) Where there is any watercourse or drain within or beyond the district of a local authority, and its obstruction, in the opinion of the local authority, is likely to cause damage to any property in such district, the local authority may order the occupier (or, if there is no occupier, the owner) of any land on, the banks of such watercourse or drain within the district or within one mile beyond the boundary of the district to remove from such watercourse or drain, and from the banks of such watercourse or drain to a distance not exceeding ten feet from the nearest margin of the watercourse or drain, all obstructions of any kind calculated to impede the free flow of water in such watercourse or drain.

(1A) For all the purposes of this section—

(a) "Obstructions" includes earth, stone, timber, and material of all kinds, and trees, plants, weeds, and growths of all kinds.

(1) [1927] N.Z.L.R. 392; G.L.R. 235. (2) [1929] N.Z.L.R. 548; G.L.R. 348.

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(b) The occupier or owner of land adjoining a road shall be deemed to be the occupier or owner of land on the banks of any watercourse or drain running upon such road where such road fronts the land of such occupier or owner, unless such watercourse or drain has been artificially constructed by the local authority for the purpose only of draining the surface of such road. 5

(2) Every occupier or owner who fails to comply with such order within fourteen days from the receipt thereof is liable to a fine not exceeding one pound for every day during which such order is not obeyed, and a further sum equal to the cost incurred by the local authority in removing any such obstruction; and the said cost shall be a charge on the land, and may be recovered as rates are recovered under any Act for the time being in force in the district. 10

Provided that any such occupier or owner may appeal to a Magistrate against such order within ten days after the service thereof, and such Magistrate shall have jurisdiction to determine whether such order shall have effect, having regard to all the circumstances of the case, and pending the determination of such appeal the order shall be suspended. 15

(3) The local authority, for the purpose of removing any obstruction from a watercourse or drain, either within or beyond the limits of the district of its jurisdiction, shall by its servants have the free right of ingress, egress, and regress on any land on the banks of any such watercourse or through which any such drain runs. 20

On the first point, as to whether a Drainage Board is a local authority for the purposes of s. 62, it was held by *Sim, J.*, in the year 1909, that s. 62 applied to a Drainage Board: *Sefton-Ashley Drainage Board v. Gorrie*(3). In 1913, the amendment to s. 62 was enacted by s. 7 of the amending Act, but there was nothing in the two new subsections to render the view expressed by *Sim, J.*, inapplicable. In 1929, in *Thompson v. Wakapuaka Drainage Board*(4), the Court of Appeal said that it must, "if necessary," hold that in s. 7 of the amending Act of 1913 the term "local authority" must be read for the purposes of that section as excluding a Drainage Board(5). But the Court also said(6) that if that view were not sound it could not help the defendant Board, because s. 7 of the Act of 1913 must still be read with s. 25 of the principal Act of 1908, with the result that it must be limited in precisely the same way as s. 50 had been held to be limited by the Full Court in *Wood v. Taranaki Electric-power Board*(7). In my view, the *ratio decidendi* of *Thompson's* case was that s. 62, as amended by the Act of 1913, applied not to public, but to private drains. 25 30 35 40

In this state of the law, s. 47 of the Finance Act, 1933 (No. 2), was passed. It is as follows:—

47. (1) Every Drainage Board shall cause all watercourses or drains from time to time vested in it or under its management to be constructed and kept so as not to be a nuisance or injurious to health, and to be properly cleared and cleansed and maintained in proper order: 45

- (3) (1909) 29 N.Z.L.R. 383, 388; 12 G.L.R. 349, 351. (5) *Ibid.*, 557; 353.
(6) *Ibid.*, 558; 354.
(4) [1929] N.Z.L.R. 548; G.L.R. 348. (7) [1927] N.Z.L.R. 392; G.L.R. 235.

Provided that nothing in this subsection shall prohibit the Board from exercising the powers conferred on it by section sixty-two of the Land Drainage Act, 1908, as amended by section seven of the Land Drainage Amendment Act, 1913.

- 5 (2) Where, in the case of any drain actually constructed by it, the Board fails to comply with the requirements of the last preceding subsection, it shall be liable to the owners or occupiers of any land for damage done thereto in consequence of or through the disrepair of such drain.

- 10 (3) This section is in substitution for section twenty-five of the Land Drainage Act, 1908, and that section is hereby accordingly repealed.

This section clearly treats s. 62 as applying to a Drainage Board. The statement of the Court of Appeal in *Thompson's* case can no longer be regarded as indicating how the law would, or might be, declared. It is plain to-day that s. 62, and therefore

- 15 s. 63, do apply to Drainage Boards.

- On the second point, as to whether s. 62 confers powers upon a Drainage Board in respect of private drains, it was held by *Reed, J.*, in *Moutoa Drainage Board v. Easton*(8), that a Drainage Board has power to order an occupier of land on the banks of a
- 20 drain vested in or under the management of the Board to remove obstructions from it. The ground of the judgment was that the decision in *Thompson's* case had been abrogated by s. 47 aforesaid. Most weight in reaching this conclusion must have been attached to the proviso, and if the proviso has the effect of completely
- 25 abrogating *Thompson's* case, then the law has been radically altered by an indirect method. I need not decide in this case whether I agree with the decision in the *Moutoa* case or not, and, with respect, I reserve my opinion on the point there in question. But, whether a Drainage Board now has power under s. 62 over
- 30 public drains or not, I clearly think that the Legislature did not intend, by the proviso to s. 47, to show that *Thompson's* case was being abrogated in so far as it held that s. 62 applied to private drains; and I do not understand *Reed, J.*, to say that he thinks the Legislature did so intend. The language is plainly wide
- 35 enough to include private drains, and there is more reason for obliging occupiers to clear obstructions from private drains than there is in obliging them to clear drains which are vested in or under the management of the Board. Again, the power to order an occupier to clear obstructions from a private drain, which is
- 40 subject to the protection of an appeal to a Magistrate, seems to me to be less drastic than the power conferred by s. 23, which, without providing for any appeal, enables a Board to make private drains from private lands and to charge the expenses to separate owners. In my opinion, the proviso to s. 47 (1) of the Finance

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(8) [1937] N.Z.L.R. 452; G.L.R. 273.

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Act, 1933 (No. 2), shows that, whether or not s. 62 now applies to drains vested in or under the management of a Drainage Board, it does apply to private drains within the Board's district or within one mile beyond the boundary of that district as specified in s. 62 (1).

It was contended that, as the Board has power to make by-laws under s. 50 of the Act for the cleansing, maintenance, and repair of private drains, the Legislature could not have intended to give an additional power of the same kind under s. 62. But I see no reason for so limiting the intention of the Legislature. Under s. 50, every by-law is subject to a criticism of its reasonableness as a by-law, whereas, under s. 62, each specific order is subject to an appeal to a Magistrate as to whether that particular order should have effect in all the circumstances of that case. The inquiry under each section has a different object, and the same result might not be accomplished under the one section as under the other.

It was also contended that if s. 62 applies to private drains within a Drainage Board's district the Board could be put in motion against a ratepayer whose land adjoined the scene of the obstruction by a ratepayer at some considerable distance from it; and that the Board might have more work thrust upon it than it was prepared to undertake. In my opinion, this position is safeguarded by the power to obtain the determination of a Magistrate which is provided both under s. 63 and again under s. 62.

The question asked in the summons is answered in the affirmative.

As to costs, the defendant Board will pay the plaintiff the sum of £8 8s. and fees of Court.

Question answered: Yes.

Solicitor for the plaintiff: *L. G. H. Sinclair* (Palmerston North).

Solicitor for the defendant: *E. T. Moody* (Shannon).

[IN THE COURT OF ARBITRATION.]

BRINDLE *v.* WELLINGTON HARBOUR BOARD.

Workers' Compensation—Practice—Nonsuit—Powers of Court—Workers' Compensation Regulations, (1909 New Zealand Gazette, 717), R. 124.

The Court of Arbitration has the same jurisdiction in matters of nonsuit as has the Supreme Court.

O'Meara and Son v. Mayor, &c., of Wellington(1) and *Readford v. Nathan and Co., Ltd.*(2), referred to.

(1) (1899) 18 N.Z.L.R. 103; 2 G.L.R. 22.

(2) [1920] N.Z.L.R. 383; G.L.R. 199.

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1938.

March 8,
April 6.

O'REGAN, J.

CLAIM FOR COMPENSATION under the Workers' Compensation Act, 1922.

Plaintiff, an employee of the Wellington Harbour Board, claimed compensation for the loss of the sight of his right eye.

- 5 He stated that on December 18, 1934, he suffered an injury to the eye by accident, in respect of which he received compensation during the period of total disablement, after which he resumed his employment with the defendant Board. Though his earning capacity was not impaired, he stated that the eye gave him trouble
- 10 more or less continuously afterwards, particularly on windy days, and that it would water badly about every three months, a distressing condition that usually lasted several days. He alleged, further, that on December 23, 1936, when he was pressing wool, a door of the shed in which he was working was blown open
- 15 by a fierce gust of wind on which was borne a thick cloud of dust. The dust came into contact with both eyes, but he felt it mainly in the right eye. This occurred during the afternoon. Plaintiff stated that after rubbing his eyes he went on with his work until 5 p.m., and, when he got home, he bathed both eyes with hot milk.
- 20 He returned to work the following day, but was obliged to cease at noon on account of the pain in the right eye. He consulted Dr. Simpson, who had him placed in hospital, where an operation was performed, but ultimately the eye had to be removed from the socket.

25 F. W. Ongley, for the plaintiff.

J. F. B. Stevenson, for the defendant.

Cur. adv. vult.

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The judgment of the Court was delivered by

O'REGAN, J. Dr. Simpson, who was called for the plaintiff, states that the cause of the eye disability was glaucoma, and he admits that he finds it difficult to connect the two happenings—the accident and the glaucoma—except on the hypothesis that the eye was predisposed to glaucoma, in which case any disturbance of the circulation may bring on an acute attack. He stated, *inter alia*, 5

I think a possible interpretation—the most probable explanation—is that the previous accident caused a dislocation of the lens and that the dust caused a topping-off, a glaucomatous condition. This theory is borne out by the behaviour of the eye under treatment and operation—the eye did not respond to treatment, and after the trephine operation the pressure did not drop as in ordinary simple glaucoma. This made me consider two possible underlying causes, tumour and cyclitis. Cyclitis was excluded, and we excluded tumour after the second operation. This makes more probable the dislocation theory. Haemorrhages may also be confidently excluded. 10 15

Dr. Cohen, on the other hand, is satisfied that it would be impossible to have a dislocated lens for two years following an accident without the knowledge of the sufferer. He adds that there is no recorded case of glaucoma resulting from the contact of dust with the eyes, that the impact must be from something more substantial. A blow would do it, because a blow would cause engorgement of blood, but even then the condition could not be latent two years. The text-books show that glaucoma follows immediately, or almost immediately, after the accident. Out of twenty-eight cases reported by Wurdheim, the furthest dates were nine days and nineteen days. Dr. Cohen is satisfied that there is no connection between the accident in 1934 and the glaucoma—a hardening of the eye-ball—the cause of which is quite obscure. 20 25 30

At the close of the plaintiff's case Mr. *Stevenson* moved for a nonsuit, but the Court determined to hear the evidence for the defence, reserving consideration of the nonsuit. Having heard the evidence on March 8, the Court took time to consider its decision, and was proceeding to give an oral judgment on the following day when Mr. *Ongley* intimated that he would elect to be nonsuited, inasmuch as there was a possibility of his getting further medical evidence. This Mr. *Stevenson* opposed, holding that the Court having heard the evidence presented for the defence the proper course was to enter judgment for the defendant, and thereupon the Court undertook to consider the matter further and to deliver a considered judgment. 35 40

Originally every case under the Workers' Compensation Act was an industrial dispute under the Industrial Conciliation and 45

Arbitration Act, and hence there was no jurisdiction to nonsuit. This was altered by the regulations under the Workers' Compensation Act, 1908. See Reg. 124, the effect of which is that this Court has the same jurisdiction in the matter of nonsuit as have the older tribunals. The right of a plaintiff to elect to be nonsuited exists at common law, and, though it has been abolished in England, it remains in this country. Further, it happens frequently in practice that the defendant moves for a nonsuit at the close of plaintiff's case, but the Court reserves the point and decides to hear the defendant's evidence, as was done here. It is well settled that in such event the plaintiff may still elect to be nonsuited before judgment, or he may be nonsuited without his consent, as was done in *O'Meara and Son v. Mayor, &c., of Wellington*(1). Doubtless, a general rule cannot be laid down, each case depending on its own particular circumstances, and it would appear that the Court has a wide discretion in the matter of nonsuit: cf. *Readford v. Nathan and Co., Ltd.*(2), per *Chapman, J.*(3). Inasmuch as the Court had commenced to deliver judgment in the present case, it may be that Mr. *Ongley* was too late to elect to be nonsuited. We think, however, upon further consideration that there should be an order of nonsuit, pursuant to Mr. *Stevenson's* motion. We fix costs at £10 10s., with £2 2s. allowance for one medical witness.

Order for nonsuit.

Solicitors for the plaintiff: *Ongley, O'Donovan, and Arndt* (Wellington).

Solicitors for the defendant: *Izard, Weston, Stevenson, and Castle* (Wellington).

(1) (1899) 18 N.Z.L.R. 103; 2 (2) [1920] N.Z.L.R. 383; G.L.R. G.L.R. 22. 199.

(3) *Ibid.*, 392-93; 204.

[IN THE SUPREME COURT.]

HOGG v. FOWLER (CONTROLLER AND AUDITOR-GENERAL).

Local Authorities—Members' Contracts—Member of Local Authority a Shareholder (as Bare Trustee only) of Company contracting with it—Whether disqualified as concerned or interested "in such contract"—Onus of Proof—Local Authorities (Members' Contracts) Act, 1934, s. 3.

A registered proprietor of shares in a company transferred such shares for value to a purchaser, but the latter omitted to register the transfer and the proprietor remained on the register as a bare trustee for the purchaser. The company was concerned or interested in contracts (exceeding the prescribed minimum) made with it by the Board of a local authority of which the registered proprietor of the shares was a member.

On originating summons to determine whether the registered proprietor of the shares was disqualified as a member of the local authority,

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Held, 1. That, not being concerned or interested in a pecuniary way, he was not disqualified under s. 3 of the Local Authorities (Members' Contracts) Act, 1934, from membership of the Board.

2. That onus of proof that a member has no concern or interest in the contracting company is on the registered shareholder.

England v. Inglis (1) applied.

(1) [1920] 2 K.B. 636.

ORIGINATING SUMMONS under the Declaratory Judgments Act, 1908, for an order determining whether the plaintiff was disqualified under s. 3 of the Local Authorities (Members' Contracts) Act, 1934, as a member of the Petone and Lower Hutt Gas-lighting Board by reason of the following facts :—

The Gas-lighting Board was a corporate body under the Petone and Lower Hutt Gas-lighting Act, 1922, and plaintiff had been a duly elected member of it for ten years prior to the issue of the summons. On November 30, 1934, a private company, known as Ballinger Bros., Ltd., was incorporated, and plaintiff subscribed to its memorandum of association for seventy-five £1 shares, which were duly allotted to him as fully-paid shares in satisfaction for the company's liability for costs to the firm of Hogg and Stewart, plaintiff agreeing with his partner to hold the shares on behalf of the firm. Plaintiff was named in the articles of association as a director of the company, which consisted of less than twenty members. Plaintiff attended the first meeting of directors on December 3, 1934, and then, knowing that the company contemplated entering into contracts with the Board, he obtained counsel's opinion, and was advised that he would become disqualified as a member of the Board if the company, while he held those shares, should enter into any contract with the Board to an amount of £10 or more. Thereupon, on December 14, 1934, plaintiff resigned his position as a director, and executed and delivered to his partner, Mr. Stewart, a memorandum of transfer of the shares on December 16, 1934, no scrip having been then issued. The contract with the partner was that he should acquire the whole beneficial interest in the shares, the plaintiff taking other shares owned by the partner in exchange. The transfer of these other shares to the plaintiff was duly registered, but Mr. Stewart, the partner, failed to register the transfer of the shares in Ballinger Bros., Ltd., and they remained in the name of the plaintiff. From December 16, 1934, however, when he signed the transfer, he had no beneficial interest in them whatsoever, nor any voice in the management of the company.

The question for determination was whether the fact that the plaintiff was still the registered owner of the seventy-five shares

disqualified him from membership of the Board, the company having made contracts with the Board exceeding the prescribed minimum.

Harding, for the plaintiff.

5 *Currie*, for the defendant.

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Cur. adv. vult.

OSTLER, J. [After stating the facts, as above :] Section 3 of the Act of 1934 provides that

- 10 No person shall be capable of being elected or appointed to be or of being a member of any local authority *if he is concerned or interested* (otherwise than as a member of an incorporated company in which there are more than twenty members and of which he is not the general manager) *in any contract* made by the local authority, . . .

- I think it clear that the Legislature, by excepting members
15 of incorporated companies which contain more than twenty shareholders, indicated its intention that a shareholder in a company containing less than twenty members should be deemed to be concerned or interested in any contract made by that company within the meaning of the section. But that, of course, means a
20 shareholder who owns the beneficial interest in the shares. The mere fact that a person is the registered proprietor of shares in a company does not necessarily and conclusively prove that he is concerned or interested in the contracts of that company. The words "concerned or interested" mean concerned or interested
25 in a pecuniary way : see *England v. Inglis*(1).

- If a person has transferred shares for value three years ago, retaining no beneficial interest in them, and has executed and delivered a memorandum of transfer to the purchaser, so that
30 of those shares except to present the transfer for registration, the person who has transferred the shares has no concern or interest in any contract made by that company, nor has he any concern or interest in the company. He is, it is true, the registered proprietor of the shares, but merely as a bare trustee, owing no active
35 duty to the purchaser, and having no concern in the activities of the company. Counsel for the Crown admits that in December, 1934, plaintiff genuinely parted with all beneficial interest in these shares. When he did that, plaintiff ceased to be concerned or interested in a financial way in any contract made by the
40 company, and therefore did not become disqualified under the section by the making of any such contract.

(1) [1920] 2 K.B. 636.

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The question as to whether a member of a local authority is disqualified under the section by being concerned or interested in any contract is one of fact depending upon the circumstances of each case. If the Audit Office finds that a Board member is a registered proprietor of shares in a company of less than twenty members which has made contracts beyond the prescribed amount with the Board, then it would, of course, be justified in assuming that an offence had taken place. But if the member is able to prove, as in this case, that he has no concern or interest in the company, then no offence has been committed. The onus should be on the registered shareholder, and the facts should be narrowly investigated. But if the registered owner has genuinely parted with the beneficial interest in the shares, he has ceased to retain the interest or concern of a shareholder in its contracts. The facts of this case prove that the plaintiff is not and never has been disqualified under s. 3 of the Local Authorities (Members' Contracts) Act, 1934, from membership of the Petone and Lower Hutt Gas-lighting Board, and I answer the question for determination accordingly.

Question answered accordingly.

Solicitors for the plaintiff: *Meek, Kirk, Harding, and Phillips* (Wellington).

Solicitors for the defendant: *Crown Law Office* (Wellington).

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Jan. 31,
Feb. 14.
LORD
WRIGHT.
LORD
ROMER.
SIR
LANCELOT
SANDERSON.
SIR SIDNEY
ROWLATT.
SIR GEORGE
RANKIN.

[IN THE PRIVY COUNCIL.]

DE BUEGER - - - - - APPELLANT
PLAINTIFF
AND
J. BALLANTYNE AND COMPANY,
LIMITED - - - - - RESPONDENT
DEFENDANT.

Contract—Performance—Contract made in England to be performed in New Zealand—Payment in "Pounds sterling"—Whether English or New Zealand currency.

The word "sterling," if used in any business document in London, means "British sterling" and nothing else.

The word "sterling" was added in the agreement of service made in London between the parties in order to define what means of discharge—i.e., what currency—was being stipulated, because the unit of account (the word "pound" or symbol "£") was the same in England and in New Zealand. The term "sterling" was an express term intended to exclude, and in fact excluding, the *prima facie* rule according to which the currency of New Zealand, the place of payment, would be meant.

Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.(1), distinguished.

Payne v. Deputy Federal Commissioner of Taxation(2); *Auckland City Corporation and Auckland Transport Board v. Alliance Assurance Co., Ltd.*(3); and *King Line, Ltd. v. Westralian Farmers, Ltd.*(4), mentioned.

Quaere, Whether the construction of the service agreement would have been the same if it had been entered into in New Zealand.

So held by the Judicial Committee of His Majesty's Privy Council, reversing the judgment of the majority of the Court of Appeal (*Ostler, Blair, and Kennedy, JJ., Reed, A.C.J.*, dissenting), [1936] N.Z.L.R. 511, G.L.R. 410, and restoring the judgment of *Northcroft, J.*, [1935] N.Z.L.R. 1043, [1936] G.L.R. 4.

(1) [1934] A.C. 122.

(3) [1937] N.Z.L.G.R. 4.

(2) [1936] A.C. 497.

(4) (1932) 48 T.L.R. 598; 43 L.L.R. 378.

APPEAL (No. 30 of 1937) from the judgment of the majority of the Court of Appeal (*Ostler, Blair, and Kennedy, JJ., Reed, A.C.J.*, dissenting), [1936] N.Z.L.R. 511, G.L.R. 410, allowing an appeal from the judgment of *Northcroft, J.*, [1935] N.Z.L.R. 1043, [1936] 5 G.L.R. 4.

The facts sufficiently appear from the above-mentioned judgments, where the agreement under notice is fully set out.

J. D. Casswell and *A. Lloyd*, for the appellant.

Alexander Ross and *Paul Tyrie*, for the respondent.

- 10 *Casswell*, for the appellant. The word "sterling" in the agreement between the respondent company and the appellant means British currency. The general rule that monetary obligations are effectually discharged by payment of that which is legal tender in the *locus solutionis* applies only when there is nothing
- 15 to take the case out of the general rule, and the use of the word "sterling" by the parties to the agreement takes this case out of the general rule. The agreement related to a commercial transaction, and is to be interpreted according to the law of the contract, which is the law by which the parties intended to be
- 20 governed, such intention to be ascertained from the contract itself and its language. The surrounding circumstances were such that the parties must be assumed to have intended that the word "sterling" should bear the same meaning in which that word then was, and now is, used in England. In England, the word
- 25 has, and had at the time of the making of the agreement, the well-known meaning of "British currency," as distinguished from the currency of other countries. The contention that the respondent company's obligation could be discharged by payment

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in New Zealand currency deprives the word "sterling" of all meaning. In this agreement, the word was intended to define the measure, and not the mode, of payment: *Auckland City Corporation and Auckland Transport Board v. Alliance Assurance Co., Ltd.*(1); *Jacobs, Marcus, and Co. v. Crédit Lyonnais*(2); *Saunders v. Drake*(3); *Scott v. Bevan*(4); and *Broken Hill Proprietary Co., Ltd. v. Latham*(5). [Counsel was stopped by the Board.] 5

Alexander Ross, for the respondent. Under cl. 4 of the agreement, the appellant's employment as tailor cutter 10 was to be subject to the usual provisions of employment of that nature adopted by the respondent company in New Zealand. The "pound sterling" means the unit of account or money of account common to England and New Zealand, and these words were used in the memorandum of agree- 15 ment to mean the pound as a unit of account. The obligation expressed in "pounds sterling" in it was fully discharged by payment to the appellant by the respondents of £700 per annum in New Zealand currency. It was not the intention of the parties at the date of entering into the agreement that any question of 20 rates of exchange should arise. The proper law of the contract is New Zealand law: *Mount Albert Borough v. Australasian Temperance and General Mutual Life Assurance Society, Ltd.*(6); *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*(7); and *Case de Mixt Moneys*(8). 25

Casswell, in reply.

The judgment of their Lordships was delivered by

LORD WRIGHT. This appeal raises a short but interesting question of the construction of an agreement about which the decisions in the Courts of New Zealand have exhibited differences 30 of opinion. The agreement was made in London on August 2, 1932, between the respondents, described as "a company incorporated in New Zealand, whose London Office is at 117 Wool Exchange, Basinghall Street, in the City of London," and the appellant, described as "Charles Francis Martin de Bueger, of 35 "139 Albany Street, Regents Park, in the County of London." Under the agreement the appellant was to proceed to New Zealand,

(1) [1937] N.Z.L.G.R. 4.

(2) (1884) 12 Q.B.D. 589.

(3) (1742) 2 Atk. 465; 26 E.R. 681.

(4) (1831) 2 B. & Ad. 78; 109 E.R.

1073.

(5) [1933] Ch. 373.

(6) [1937] N.Z.L.G.R. 65.

(7) [1934] A.C. 122.

(8) (1605) 2 State Tr. 113; Dav. 48.

there to be employed by the respondents as a tailor cutter for a period of three years from his arrival at a remuneration of £700 sterling a year.

The sole question is whether the appellant is entitled under 5 that agreement to be paid according to the English or the New Zealand value of the pound. At the date of the agreement the latter was at about 10 per cent. discount as compared with the former, later during the period of the service the discrepancy rose to 24 or 25 per cent.

10 A special case was submitted to the Court. It states that the appellant had always consistently claimed to be paid the agreed salary "in such sums of New Zealand currency as should
"be the equivalent at the time of each payment of the same
"amount in sterling" and that the respondents had refused to
15 pay the £700 otherwise than in New Zealand currency. The case stated three questions for the opinion of the Court, of which the answer to the first is decisive of the dispute. It is

(1) Was the plaintiff [appellant] entitled to be paid the agreed salary in such amounts of New Zealand currency as would be the equivalent of
20 sterling according to the rate of exchange current at the time of each payment?

No point is raised on the phrasing of this question which might seem to suggest the answer. Question 2 is whether, if the appellant is right in his claim, the deficiency on each periodical payment
25 carries interest? This is not now disputed. Question 3 is whether the payments actually made in New Zealand currency of £700 were a full discharge of the agreed salary? The answer to that question obviously must follow the answer which is given to the first question.

30 *Northcroft, J.*, in the Supreme Court decided in favour of the appellant(1). He held in effect that the question was purely one of construction of this particular contract. The use of the word "sterling" could not, in his opinion, be regarded as a mere habit of speech not meaning anything more than legal tender.
35 In this contract he thought the word must be construed as signifying English currency in contrast with current of other countries, and in particular with that of Australia or New Zealand. He referred to recent cases in which this contrast between sterling and other currency was plainly recognized.

40 In the Court of Appeal that decision was reversed by a majority(2). *Reed, A.C.J.*, who dissented, held that in the absence of the word "sterling" the salary would have been payable in

(1) [1935] N.Z.L.R. 1043; [1936] (2) [1936] N.Z.L.R. 511; G.L.R. G.L.R. 4. 410.

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New Zealand currency because it was the currency of the place of performance. But the use of the word "sterling," which was not common form in a contract of service, in a commercial contract drawn and executed in London, must, in his opinion, be taken to express "the intentions of the parties as to the currency in which the remuneration should be paid." He held that "sterling" here meant British currency and was in constant use in that sense(3).

Ostler, J., as also *Kennedy*, J., with whose judgment *Blair*, J., agreed, took the opposite view. *Ostler*, J., held that as in August, 1932, the New Zealand pound was only at a discount of 10 per cent. and was not depreciated to 25 per cent. until January, 1933, the appellant was not likely to have exchange questions in his mind, and, if he had, should have insisted on less ambiguous language than the word "sterling," which he said was used both in England and New Zealand as meaning the currency which has now taken the place of gold as legal tender. He would have come to a different conclusion if the New Zealand pound had been a different unit of account when the contract was made, but held that it followed from *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*(4), that the English and New Zealand pound were the same, and hence that payment in New Zealand currency was a sufficient performance, since in New Zealand the word "sterling" at least until the Reserve Bank of New Zealand Act, 1933, meant nothing more than paper money which had taken the place since August, 1914, of the sovereign as legal tender(5). *Kennedy*, J., also emphasizes as the ground of his decision that "the English pound or the pound sterling, as the unit of account, is not only identical with the English pound used in England for so many years, but it is also one and the same as the New Zealand pound"(6). "The pound in New Zealand is," he held, "the same unit of account as the pound in England, not merely a unit of account with the same name"; hence he concludes "the obligation to be discharged by payment in New Zealand is expressed in a money of account common to New Zealand and to England, and will be discharged by tender of that which is legal tender at the place of performance"(7). Thus in his judgment the word "sterling" adds nothing. It merely, he adds, "emphasizes what is already clear, that the money of account is English"(8). He seems to use interchangeably unit of account

(3) [1936] N.Z.L.R. 511, 523;

G.L.R. 410, 413.

(4) [1934] A.C. 122.

(5) [1936] N.Z.L.R. 511, 526-27;

G.L.R. 410, 415.

(6) *Ibid.*, 528, l. 35; 416.

(7) *Ibid.*, 529, l. 4, 417.

(8) *Ibid.*, 529, l. 27; 417.

and money of account, though the former should refer to a denomination and the latter to a currency.

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Their Lordships, with the greatest respect, find themselves unable to agree with the majority of the Court of Appeal. It is 5 important to realize what the *Adelaide* case(9) actually decided. The decision was that a sum in "pounds" payable under a contract made in England but payable in Australia was payable not in sterling but in Australian currency. The difference in money value was very substantial, so that to a practical mind it would 10 seem wrong to say that the English pound and the Australian pound were the same. They were only identical in name and as a matter of words, though up to 1914 they had been the same both in name and in fact, both being linked to gold, and based on the same gold coin, the sovereign. This identity in words 15 combined with practical difference in value was expressed by Lord Warrington of Clyffe in the *Adelaide* case, where he said: "I have come to the conclusion that merely as a unit of account, "the pound symbolized by the '£' is one and the same in both "countries, and that the difference in the currencies merely con- 20 "cerns the means whereby an obligation to pay so many of such "units is to be discharged"(10). It was just this difference in the "means" of discharging the obligation—that is, the actual currency—which was the essence of the case.

This practical difference was again emphasized in *Payne v.* 25 *Deputy Federal Commissioner of Taxation*(11), where an Australian taxpayer was objecting to convert income received in English sterling and left in England into Australian currency when making his tax returns. The figure of income, if so converted, was substantially higher than it would have been if he could have 30 brought in his sterling income at its face amount. It was held that he was bound to convert the English pounds into Australian pounds. The name of the measure of the obligation might be identical, but the measure of the value connoted or of the means of discharging it was different.

It is clear that under a contract like that in question what 35 matters to the parties is the means—that is, the currency—in which the obligation is to be discharged. In their Lordships' judgment the word "sterling" was added in the agreement in order to define what means of discharge—that is, what currency— 40 was being stipulated. The necessity for adding the word was simply because the "unit of account" the word "pound" or

(9) [1934] A.C. 122.

(10) *Ibid.*, 138.

(11) [1936] A.C. 497.

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symbol "£" is the same both in England and in New Zealand. If the word "sterling" had not been inserted, the salary would have been payable in New Zealand currency, that being the place of payment, on the principles laid down in the *Adelaide* case(12). The effect of that decision was recently summarized 5 by this Board in *Auckland City Corporation and Auckland Transport Board v. Alliance Assurance Co., Ltd.*(13): "It is quite clear that the whole problem [in that case] arose because of the divergence in value of the two currencies, and it was solved, as a question of construction, by determining what currency, 10 on the true construction of the contract, was connoted by the use of the word 'pound.' It was held that in the absence of express terms to the contrary, or of matters in the contract raising an inference to the contrary, the currency of the country in which it was stipulated payment was to be made was the 15 currency meant. Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connoting the appropriate currency"(14). In the agreement here in question, the word "sterling" in their Lordships' judgment is an express term intended to exclude, and, in fact, excluding, 20 the *prima facie* rule according to which New Zealand pounds would be meant, as being the currency of the place of payment. It is impossible in their judgment to regard the word as indicating simply legal tender at the place of payment, New Zealand. The agreement is clearly on its face a formal and studied document. 25 It is drawn up and executed in London between the respondents' London house and the appellant, a London resident. The insertion of the word "sterling" is not common form in a service agreement like this. If it is used in any business document in London, it naturally means "British sterling" and nothing else. 30 It is used in this sense habitually in exchange quotations and in documents dealing with international transactions, in which it is necessary to define the currency intended, including transactions with the Dominions. The contrast between sterling—*sc.*, British sterling or currency—and Dominion or Colonial currency is familiar. 35 The contrasted use of these terms is to be found in seventeenth and eighteenth century authorities, of which some are cited in the *Adelaide* case(15). The contrast between sterling and other currency is also illustrated in the *King Line, Ltd. v. Westralian Farmers, Ltd.*(16), where the charter-party distinguished between 40 British sterling and Australian currency, and also *passim* in recent

(12) [1934] A.C. 122.

(13) [1937] N.Z.L.G.R. 4.

(14) *Ibid.*, 152, l. 16.

(15) [1934] A.C. 122, 153.

(16) (1932) 48 T.L.R. 598; 43 Ll.L.R. 378.

judgments in this country such as the *Adelaide* case(17) and the *Auckland* case(18). Having regard to the place where, and the parties between whom, this contract was made, their Lordships are satisfied that the appellant's claim is well founded. It is not
5 to be forgotten that in August, 1932, exchange questions were matters of business moment. The appellant who was going to New Zealand might naturally desire to be assured that he would be paid in the currency with which he was familiar.

Their Lordships do not desire to express any opinion on the
10 question whether the construction of the agreement would have been the same if it had been made and entered into in New Zealand. On this question eminent Judges in New Zealand seem to differ, and their Lordships need not decide it on this occasion. But it would not, in their Lordships' judgment, be right to attribute
15 to the appellant, or indeed to the respondents' London house, or to those who drafted the agreement, any familiarity with the law and practice of New Zealand in matters of currency, or any intention to import that law or practice, whatever it might be, into the agreement, which was obviously drafted with the idea
20 of eliminating any doubt or dispute that the appellant would be paid the same amount of salary as if he were working in England.

For these reasons, their Lordships are of opinion that the appeal should be allowed and the judgment of *Northcroft, J.*, restored. If the parties are unable to agree on the sum to which the
25 appellant is entitled, there must be an order for a reference to the Supreme Court to fix it. The appellant will have his costs of this appeal and his costs in the Courts below.

Their Lordships will humbly so advise His Majesty.

Appeal allowed.

Solicitors for the appellant : *Lloyd and Lloyd* (London), agents for *Bell, Gully, Mackenzie, and Evans* (Wellington).

Solicitors for the respondent : *Wray, Smith, and Halford* (London), agents for *Raymond, Stringer, Hamilton, and Donnelly* (Christchurch).

(17) [1934] A.C. 122.

(18) [1937] N.Z.L.G.R. 4.

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[IN THE COURT OF ARBITRATION.]

NATTA v. WELLINGTON HARBOUR BOARD.

1938.

March 10,
18.

O'REGAN, J.

Workers' Compensation—Liability for Compensation—Scheduled Injury to Right Forefinger—No loss of Earning Capacity—Whether "Permanent loss of the use of" damaged Finger-joint—Workers' Compensation Act, 1922, s. 8, Second Schedule.

A worker whose injured right forefinger is still capable of fulfilling its natural and normal functions to an appreciable degree—weight of medical opinion opposing amputation of a phalanx thereof—is not entitled to the compensation provided in the Second Schedule for the permanent loss of the use of such finger.

CLAIM FOR COMPENSATION under the Workers' Compensation Act, 1922.

The plaintiff met with an injury by accident, under circumstances entitling him to compensation, at the Wellington waterfront on August 11, 1937. His right hand was lacerated, and he was paid £21 6s. 6d. for temporary total disablement. 5

He claimed in addition a weekly payment of 4s., being 5 per cent. of full compensation, for the permanent loss of the use of the terminal phalanx of the right index finger. It was common ground that there was permanent disfigurement and impairment 10 of function of the finger, but that there had been no loss of earning capacity, plaintiff having resumed his former employment with the defendant Board at the same rate of wages.

The one question in issue was whether the injury amounted to permanent loss of the use of the damaged finger-joint within 15 the meaning of the Second Schedule of the Workers' Compensation Act, 1922.

F. W. Ongley, for the plaintiff.

J. F. B. Stevenson, for the defendant.

Cur adv. vult. 20

The judgment of the Court was delivered by

O'REGAN, J. Dr. W. S. Robertson, who was called for the plaintiff, states that the injury is permanent, but that the joint, being partially hooked inwards, is in a much better position than if it were bent further inwards so as to form a "hammer finger." 25 The finger is brought into use if the object grasped is sufficiently

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large; but, as the joint cannot be bent fully inwards, it cannot be used for grasping any small object, such as a pen or a wire nail, and the plaintiff gave the Court a demonstration, indicating that, in grasping such objects, he brings his thumb against the side of the joint, the phalanx projecting beyond. Dr. Robertson thinks that the second joint, the movement of which is still rather limited, will improve, and he does not recommend amputation of the terminal phalanx, giving as the reason for his view that it is useful in picking up or grasping objects large enough to enable the finger to be pressed firmly against them. Dr. Austin, also called for the plaintiff, agrees with Dr. Robertson in his description of the injury, but is of opinion that the finger would be more serviceable if the terminal phalanx were amputated, and he adds that he has advised amputation from the outset. For the defence Dr. Mackay agrees with Dr. Robertson that there is permanent injury, but that the terminal phalanx is too useful to warrant amputation. He thinks that were the phalanx bent inwards sufficiently to make a "hammer finger," though it might still be useful for some purposes, yet it would be in a position making the hand so awkward that he would advise amputation. Under the circumstances, however, he thinks that there is so much useful function in the injured phalanx that amputation is inadvisable. Under cross-examination Dr. Mackay agrees that the joint will not bend beyond the position in which plaintiff holds it, and that for this reason it may be that he feels the phalanx "in the way" when picking up small objects, but the witness insists that the damaged part is brought into action and is quite useful in grasping such objects as a shovel-handle or a truck-shaft.

The Second Schedule, prescribing the payment of compensation for the injuries therein prescribed irrespective of impaired earning capacity, was enacted first in 1908. Throughout the Schedule the words used are

loss of both eyes, loss of a hand or a foot, the total loss of a joint of a finger, &c.

but the words are added :

For the purposes of this Schedule an eye, hand, or foot shall be deemed to be lost if it is rendered permanently and wholly useless.

The meaning of these words was well illustrated in *Grace v. Auckland Gas Co., Ltd.*(1). There plaintiff's right eye had been injured so seriously as the result of accident in the course of his employment that it was agreed that, though the eye was not sightless, yet were the other eye injured to the same extent, the plaintiff

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would be unable to earn wages. This Court (per *Sim*, J.) held that the eye was "permanently and wholly useless" within the meaning of the Second Schedule(2).

The limitation imposed on the Court by these words was considered in *Simmons v. Lambert*(3). In that case, the plaintiff had suffered the loss by amputation of the two joints of the right index finger and the second and third fingers were so stiff and contracted that they were held to be useless. Nevertheless, the Second Schedule, though it prescribed the payment to be allowed for the loss of fingers or parts thereof by amputation, did not ordain payment for any member "permanently and wholly useless," save in respect of "an eye, hand, or foot." Accordingly, this Court (per *Sim*, J.) ordered that weekly compensation be continued until further order(4). Apparently, it was on account of the anomalous position disclosed by the case in question that the Second Schedule was amended by s. 15 of the Workers' Compensation Amendment Act, 1911. The words

For the purposes of this Schedule an eye, hand, or foot shall be deemed to be lost if it is rendered permanently and wholly useless

were repealed and the following words were substituted :

For the purposes of this Schedule the expression "loss of" includes permanent loss of the use of.

Clearly the effect of the amendment was to enable the Court to treat any injury covered by the Second Schedule as equivalent to loss by removal or amputation of the injured part if the circumstances warranted its doing so. Thus the difficulty which confronted the Court in *Simmons v. Lambert Bros.* was disposed of.

Though there is no reported case illustrating the principle on which the Court will act in determining whether a plaintiff who has suffered injury, say, to a finger or a joint thereof, has sustained "permanent loss of the use of" the damaged member, the point has been frequently considered, and the Court has never decided in favour of plaintiff where the weight of medical evidence was to the effect that the loss was not equivalent to loss by physical separation. Here the medical witnesses called by the plaintiff are divided in opinion, and the majority emphatically oppose amputation of the injured phalanx for the reason that the finger is more useful with than without it. Unquestionably, the plaintiff, in the course of his work, will handle objects usually larger than such small objects as nails and penholders, and accordingly we hold that the finger is still capable of fulfilling its

(2) (1913) 15 G.L.R. 442, 443.

(4) *Ibid.*, 365.

(3) (1909) 12 G.L.R. 364.

natural and normal functions to an appreciable degree. Plaintiff has been paid weekly compensation for the period of temporary total disablement resulting from the accident, and so judgment must be for the defendant Board, to whom leave is reserved to
5 apply for costs.

Judgment accordingly.

Solicitors for the plaintiff: *Ongley, O'Donovan, and Arndt*, (Wellington).

Solicitors for the defendant: *Izard, Weston, Stevenson, and Castle* (Wellington).

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STEWART v. WELLINGTON CITY CORPORATION.

Workers' Compensation—Assessment—General Neurasthenia—Policy of Court not modified—Workers' Compensation Amendment Act, 1936, s. 9.

Section 9 of the Workers' Compensation Amendment Act, 1936, requires no modification of the policy of the Court of Arbitration that in normal cases of neurasthenia—prompt settlement being the remedy most appropriate and effective—there should be full weekly compensation to date of settlement and three months, in addition, by way of lump sum. The plaintiff will refuse at his peril an offer of such settlement.

Adam v. Westport Coal Co., Ltd.(1), and *Jones v. The King*(2), referred to.

(1) [1927-28] N.Z. W.C.C. 17.

(2) [1933] G.L.R. 437.

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CLAIM FOR COMPENSATION under the Workers' Compensation Act, 1922.

The plaintiff alleged that on or about May 29, 1936, he suffered an injury by accident arising out of and in the course of his
5 employment in that, while emptying a sack of rubbish into a dust-cart, he bruised and injured the small of his back in the region of the sacro-iliac joint by collision with the iron bar of the dust-cart. Though accident and injury were formally denied, they were admitted in fact, inasmuch as compensation at the rate of £3 4s.
10 per week was paid to October 30, 1936. The defendant Corporation

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denied further liability beyond weekly compensation as from the date of the last payment to December 18, 1936, amounting to £22 9s. 9d., but plaintiff claimed full weekly payments to date of judgment and such additional compensation by way of commuted weekly payments as may be reasonable.

The medical witnesses agreed that there had been no bone injury, and it was not suggested that there was anything in the nature of permanent disablement, indeed the original injury could only be described as trivial. Dr. Douglas Brown, who saw plaintiff for the Corporation on the day of the accident, diagnosed a bruise and was of opinion that the injury would clear up in about three weeks during which he counselled plaintiff to bathe the injured part in hot water. Dr. Brown appeared to have seen the plaintiff regularly every week until August 25 following, when he suggested that plaintiff settle the case and return to work. Plaintiff then consulted Dr. Richards, who thought he should receive a further six weeks' compensation, and Dr. Walter Robertson, to whom he referred plaintiff, agreed. He then received six further weekly payments as from August 19, 1936, and on October 29 the town clerk wrote plaintiff that a further six weeks' compensation would be paid in final settlement. Plaintiff then consulted Drs. Austin and Paterson. Later, he consulted Dr. Sternberg, and, after him, Dr. Gillies. Then, through his counsel, he offered to settle for compensation to date plus three months' additional payment. That offer was refused, and plaintiff had had no subsequent treatment, though he still complained of pain and inability to work.

In February, 1937, having tried unsuccessfully to get a special fixture for the disposal of the case by the Court, Mr. *Ongley*, on plaintiff's behalf, suggested that the case might be disposed of in the Magistrates' Court pursuant to s. 20 of the Workers' Compensation Act, 1922, but this proposal was not accepted, and so the case had remained in abeyance since.

F. W. Ongley, for the plaintiff.

J. O'Shea, for the defendant.

The judgment of the Court was delivered orally by

O'REGAN, J. [After stating the facts, as above:] Dr. Richards, who saw the plaintiff six or eight weeks after the accident, when he was unable to stand upright and complained of pain in the lumbar region, concluded, and is still of opinion, that plaintiff is quite honest, and he sent him to Dr. W. S. Robertson, who counselled

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the payment of six weeks' further compensation. Dr. Richards has seen him on several occasions since, and states that, although he is now able to stand in a more upright position, he is still "very nervy." He thinks that he could do light work if it were

5 available, and he adds that the complaint of pain and the fact that plaintiff perspires freely, particularly in the locality of the injured part, is an indication of nerve injury. Dr. Austin, who saw plaintiff first on February 5, 1937, found that he could not then stand upright without pain, though there was no wasting

10 or fracture. He diagnosed fibrositis and advised massage. He last saw him the day before the hearing, when there was full flexion of the left thigh, the pulse was 108, and he adds that the insistence of plaintiff of giving a detailed account of what the other doctors had said to him indicates neurasthenia. Dr. Paterson saw

15 plaintiff first on February 12, 1937, when he complained of pain in the sacral region and inability to do any work. Plaintiff complained that he was unable to lie on his left side, and that there was a good deal of aching down the front of the left thigh. Dr. Paterson found three small scars over the lower back, but other-

20 wise the back presented a normal appearance and its movements were, and are, normal. The region of the coccyx was tender on palpation, and there was marked tremor of the fingers. In Dr. Paterson's opinion, the case was one of traumatic neurasthenia pure and simple, and he advised massage and the administration

25 of bromide. Dr. Paterson has seen the plaintiff several times since, and finds the condition unchanged; but he thinks the plaintiff will make a complete recovery after the case has been settled.

Dr. Giesen, who saw the plaintiff first on March 3, 1937, and again on February 23 last, on each occasion in consultation with Dr.

30 Douglas Brown, says that, though there is a mark above the buttock, the result of the accident, and two other marks in no way connected therewith, there is no organic injury. He pronounces plaintiff a neurasthenic, and says that he would have recovered shortly after that condition had supervened had the case been

35 settled. Dr. Douglas Brown found no more than a superficial injury, and advised accordingly. On August 25, 1937, he reported to the defendant Corporation, advising settlement by payment of six weeks' compensation in a lump sum, as plaintiff was developing a neurasthenic condition. He saw the plaintiff quite recently,

40 and found the condition unchanged.

Mr. O'Shea, who appeared for the defendant Corporation, seems to make light of the plaintiff's condition, and expressed the opinion that the Court usually deals too tenderly with cases of this kind—

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that as a result injured men are induced to refuse reasonable offers of settlement, feeling that they will be dealt with more liberally by the Court—and he suggests that plaintiff would be liberally compensated by allowing him the additional compensation offered. On behalf of plaintiff, Mr. *Ongley* submits that, this being a genuine case of neurasthenia, his client should receive full compensation to date and a reasonable commutation of future payments as well.

In addition to hearing the medical evidence, the Court has had the advantage of seeing and hearing plaintiff himself in the witness-box, and we have no doubt whatever that his is a normal case of neurasthenia. That condition frequently supervenes in cases of serious injury; but it sometimes follows trivial injuries, and it is now well established that prompt settlement is the remedy most appropriate and effective. Accordingly, the Court has long since established the rule that in such cases there should be full weekly compensation to date of settlement and three months, in addition, by way of lump sum. If such a settlement is offered, the plaintiff will refuse it at his peril, and there have been many cases, though few of them appear to have been reported, where this Court has refused compensation beyond the amount offered. In *Adam v. Westport Coal Co., Ltd.*(1), weekly compensation had been paid for some time, but the case was brought to Court to have the amount of compensation fixed. There was considerable conflict of medical opinion as to the condition of plaintiff; but it was common ground that there was a substantial element of neurasthenia in the case, and the defendant company paid into Court three months' compensation, in addition to weekly payments to date, plaintiff having refused to accept the amount. Although plaintiff's condition had not improved when the case came to trial, this Court (per *Frazer, J.*) was satisfied that recovery had been delayed by reason of plaintiff's refusal to accept the amount offered, and refused to penalize the defendant company and gave judgment for the amount paid into Court without costs. The case of *Jones v. The King*(2) is authority for the proposition that where a claimant has recovered from the physical effects of an injury, as far as recovery is possible, and is offered compensation which he unreasonably refuses to accept, and he subsequently develops a neurasthenic condition, it is not true traumatic neurasthenia arising from the injury, but is rather an anxiety neurosis, and in such a case the Court will regard that neurosis as unrelated to the original injury and will refuse compensation in respect thereof.

(1) [1929-28] N.Z. W.C.C. 17.

(2) [1933] G.L.R. 437.

Moreover, this class of case must be considered now in the light of s. 9 of the Workers' Compensation Amendment Act, 1936, which has been in operation since January 1, 1937. The section in no way requires any modification of the policy of the Court, 5 as the same has been outlined, in cases of neurasthenia. Inasmuch as the section, however, empowers the medical practitioner who has been treating an injured man, as well as a medical committee of three, to terminate compensation, the statement herein outlined of the Court's view should assist them in determining any case 10 where the neurasthenic element is not complicated by any other disabling factor.

Here the medical evidence is all one way. Plaintiff is suffering from a neurasthenic condition, the sequela of an injury by accident. It is unfortunate for both parties that, owing to a combination of 15 circumstances, the Court has not sat in Wellington for a considerable time. Had the defendant, at the time an offer of settlement was made, tendered to the plaintiff or his solicitor an amount equal to full compensation to the date of the offer and three months in addition, the Court would be constrained to hold, in 20 accordance with the principles laid down as set out in this judgment, that the offer was a sufficient one, and judgment would have been given accordingly. As such an offer was not made, it would be unreasonable now to penalize the plaintiff, whose solicitor made all reasonable efforts to have the case disposed of. Accordingly 25 we have decided to allow full weekly compensation to date, and thirteen commuted weekly payments in addition. We allow plaintiff costs, £7 7s., and an allowance of £2 2s. for each medical witness.

Judgment for the plaintiff.

Solicitors for the plaintiff: *Ongley, O'Donovan, and Arndt* (Wellington).

Solicitor for the defendant: *J. O'Shea*, (Wellington).

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Sept. 23.
Oct. 15.

1938.

April 6.

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Workers' Compensation—Accident Arising out of and in the Course of Employment—Coronary Thrombosis—Angina of Effort—Contradictory Medical Evidence—Report of Medical Referee—Distinguishing Characteristics Explained—Workers' Compensation Act, 1922, s. 3.

Where a plaintiff fails to show that the work he was doing at the time of the effort which caused his disablement affected in any way the coronary artery disease from which he was suffering, but merely induced an attack of angina pectoris, which could not account in any way for his subsequent incapacity, he must be held as not having been injured by accident arising out of and in the course of his employment.

CLAIM FOR COMPENSATION under the Workers' Compensation Act, 1922, as for total disablement to date of trial and such additional compensation as might be reasonable.

The plaintiff, a waterside worker, aged fifty-four, was employed by the defendants, who were stevedores, and on Saturday, October 17, 1936, he was assisting to load the s.s. *Monterey*, then moored at the Prince's Wharf, Auckland, with drums of tallow. These drums weighed each about 4 cwt., and there were about 250 of them to be placed on board. It was while attempting to move one of these with his workmate, J. Redfern, that plaintiff felt a severe chest pain, which obliged him to cease work, and he had been disabled ever since. 5

Sullivan, for the plaintiff.

Hore, for the defendant.

Cur. adv. vult. 15

The judgment of the Court was delivered by

O'REGAN, J. In view of the contradictory nature of the medical evidence at the hearing, the Court decided to refer the case to Dr. F. Fitchett, Professor of Clinical Medicine at the University of Otago, who was supplied with all the relevant particulars, and, as his report contains a correct epitome of the facts, they are not here repeated. 20

REPORT OF MEDICAL REFEREE.

The Evidence:—

I have before me a summary of the evidence prepared by O'Regan, J., Mr. Prime's notes of the evidence, the Auckland Hospital record, the Radiologist's report, a print of the electrocardiogram, and a letter addressed to O'Regan, J., by Dr. Johnson. From these sources the case may be stated thus:— 25

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- Plaintiff:* The plaintiff, a short, well-developed, powerful man, aged fifty-four, had had no previous illness, and prior to October 17, 1936, had had no symptoms indicative of cardiac or
- 5 vascular disease. He had been a consistent, steady worker for seventeen years, capable of undertaking and doing efficiently the heaviest class of work on the waterfront. In his evidence he states that on Saturday, October 17, 1936, he began work at 8.30 a.m. and was occupied in handling drums of tallow. These
- 10 drums were 4 ft. high, weighed about 4 cwt. each, and had concave bottoms which tended to make them adhere by suction to the smooth bitumen floor on which they were stacked. This increased the difficulty of moving them and made the work more arduous. The procedure was for the plaintiff and his workmate together to
- 15 pull out a drum from the stack, tilt it to enable the truckman to insert the lip of the truck beneath the drum, and then push the drum back on the truck, which was wheeled by the truckman to the ship's side. Plaintiff and his mate had been engaged upon this work for some three hours, when they met difficulty in moving
- 20 one particular drum of which an encircling rim had got jammed beneath the rim of a neighbouring fellow. In order to give his mate more room and to himself get greater purchase, he placed himself sideways between the jammed drum and another nearby, and with a hand on each attempted to heave the jammed
- 25 drum forward. As he did so, he felt a sharp pain across his chest and at once let go. It was a momentary effort. "From the "time I started to heave till I got the pain was momentary. I "got the pain and let go the drum. I sat down for a few minutes "till the pain had disappeared, and then got up and moved round
- 30 "the shed very quietly, still very sick and groggy. I had a terrible "weak feeling in the stomach and chest; did not vomit." He did no more work before lunch. In the afternoon he worked continuously till 4 p.m., but did relatively light work such as wheeling sacks of kauri-gum some hundred yards on a down grade.
- 35 These sacks weighed 120 lb. each, and he wheeled them two at a time, but did not load them on to the barrow himself. He also wheeled six cases of kauri-gum (200 lb.) on a hand-carrier's truck, and helped his workmate to roll a few drums of tallow to the ship's side, but merely put his hand on the drums and walked beside
- 40 them. In his own words, "I did not do my bit." All the time he felt ill. "The grogginess and sickness was there all the time. "It never left me. There was something about my chest that was "not right. I felt very weak." As he walked to the tram-stop

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on his way home, he had "a slight touch of pain in the chest." In the tram "he was fairly restless but still had pain, not actual "pain, but felt a terrible weakness." After leaving the tram, on walking up a rise to his house, he "had a definite pain this "time that continued till I arrived home." After resting a while outside, he went supperless to bed and remained there till Monday morning. The "peculiar" feeling in the chest which had never left him was then still present; but after a light breakfast he decided to go to work with the idea of working this feeling off. On the way to the wharf he again felt pain "very slightly." He was engaged to work on the *City of Brisbane*, and as he walked to the ship the pain came again. He expressed a doubt to the hatch-foreman of his ability to work, was told to "give it a go," and went below; but found he could do nothing, and most of the time sat in a corner. After being twice rallied by the foreman for doing no work, he, at lunch-time, went to Messrs. Leonard and Dingley's office and reported the accident. He was advised to see a doctor, and called upon Dr. Dreadon at his surgery. "I "was definitely crippled all the way there and home." He was sent home to bed, and remained there, feeling ill all the time, until the doctor called on Wednesday, October 21. Feeling better on Thursday, he got up and went to the Union Office, but before he reached the office pain in the chest occurred again. At the office he looked so ill that he was sent home. Next day he called on Dr. Dreadon and was advised to enter hospital, but was unable to gain admission till November 4. In the interim he stayed in bed, all the time feeling ill. He remained in hospital till November 22, when, on his own suggestion, he was discharged with instructions to rest at home. While in hospital, he felt the pain on three occasions; but of all the attacks of pain he had experienced the severest was the onset on October 17, and this was a sharp momentary pain.

Joseph E. Redfern, who worked with plaintiff on October 17, referring to the accident of the jammed drum, states that plaintiff "reached out and gripped another drum to get a pull. We both "pulled on the drum together. He was just pulling, when he "let go and said, 'This is no good.' He just turned round and "went and sat on bags of gum. When I looked round he looked "very sick and white. He stayed there five to ten minutes, and "then walked about the shed. He appeared very sick to me. "I did not think it anything serious at the time. He did no heavy "work the rest of the day and very little work of any kind, in "fact."

John Benily, foreman, New Zealand Shipping Co., confirmed plaintiff's statement that he did no work on the *City of Brisbane*. In the course of the morning he made only one rope. His mate did the work. He looked very pale when he arrived in the morning and "had his hand on his chest when he spoke to me."

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The Medical Evidence:—

Dr. John Dreadon: "Plaintiff called on me at 2.30 p.m. on "October 19, complaining of an uneasy feeling in the chest, with "pain in the chest on exertion. He gave a history like that given
10 "in Court, and said that when he pulled on the drum he got a "sudden pain at the lower end of the breast-bone, which was "momentary, going as soon as he sat down. He looked pale and "ill; pulse 120, heart slightly enlarged. A deep breath caused "pain at the lower end of the sternum. I thought he had
15 "sustained a muscle-strain, and advised him to rest completely. "On Wednesday, October 21, I saw him in bed, looking much better. "His pulse had fallen to 92 or 98. He was still complaining "of an uncomfortable feeling in the chest, increased by taking "food. I still thought it a case of muscle-strain. I advised him
20 "to continue resting and to call on me in a week. I expected him "to be all right. Then I next saw him on November 4, when he "came to my house. I was astonished to see him looking ill, colour "bad, pulse racing. He complained that any exertion caused "pain at the lower end of the sternum, radiating to the left side,
25 "and he still had discomfort after food. I was now suspicious "that he might be suffering from a heart-condition, and arranged "for his admission to hospital."

Dr. H. Wilson, Senior Medical Officer of the Auckland Hospital, produced the hospital record, which was put in evidence.
30 Plaintiff was admitted on November 4. He saw him on November 6, took his history, and examined him. There were several attacks of pain, one rather more severe than the others which followed immediately on psychological excitement. Trinitrin gave quick relief in each case. His diagnosis was coronary occlusion probably
35 due to coronary thrombosis. This diagnosis was written up after patient was discharged. He admitted that the history recorded by him was incorrect on the evidence given in Court.

Medical Evidence for the Plaintiff:—

Dr. E. H. Roche, Honorary Physician to the Auckland
40 Hospital, accepted the history as given in Court. He first saw plaintiff in hospital about November 4. He was under his care

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there until November 22, and has been his private patient since. He regarded the case as one of "angina of effort with a weakened "heart." Plaintiff's blood-pressure was 160/100, the pulse rate 86, and an electrocardiogram taken a week after admission to hospital showed a definite amount of myocardial degeneration, and left ventricular preponderance which he interpreted as indicating simple hypertrophy. During his stay in hospital plaintiff had some attacks of pain, probably brought on by worry, which were relieved by trinitrin. Together with Dr. Wilson he examined plaintiff, but was unable to hear the pericardial friction heard by Dr. Wilson. In cross-examination he accepted Dr. Wilson's statement that friction was present; but, assuming that friction was present, he would attach little importance to it eighteen days after the accident, for when friction occurs in coronary thrombosis its duration is transient. He was definitely opposed to the suggestion that the pain induced by the effort was due to coronary thrombosis because it was of extremely short duration and was relieved by rest. Thrombosis may be painless, but if pain do occur it is prolonged. Moreover, it was very improbable that thrombosis would occur at the moment of maximum effort; but, assuming there was a thrombosis subsequently, it would be reasonable to connect it with the accident for after a strain of the heart there is a prolonged fall of blood-pressure lasting many weeks or months, and reduced blood-pressure may be a factor in causing coronary thrombosis. His interpretation of the facts was that prior to the accident plaintiff showed good cardiac tolerance and, therefore, his heart must have been comparatively healthy. The effort made in pulling upon the drum of tallow caused irreparable damage to the heart by over-stretching the heart-muscle and so impairing its power of contraction. As a result plaintiff's cardiac tolerance was permanently reduced; he suffered, and still suffers, anginal pain whenever he exerts himself, and his working-life has been shortened by at least two years. His explanation of the mechanism by which the heart was damaged is stated thus: "When a man is making a great physical effort, he holds his breath forcibly and makes expiratory efforts against a closed glottis. This has the effect of forcing venous blood out of the chest into the veins of the neck and arms. There is a diminution of the quantum of blood entering the heart, and the arterial pressure temporarily falls. The heart, however, is working exceedingly hard, and it is at that moment that the anginal pain is most likely to occur. Immediately after the maximum effort deep

“breathing takes place, there is a rush of blood into the heart, “causing distension, and the heart, being unhealthy, it may be “impaired.” In the present case the sudden inrush of blood that occurred when the plaintiff relaxed caused such extreme distension of the heart that the heart-muscle was stretched to a degree sufficient to impair irreparably its contractility. He did not think that the left ventricle would escape injurious distension because the incoming rush of blood must necessarily pass first through the right side of the heart and thence through the lungs before reaching that chamber. The stretching of the heart-muscle was comparable to the stretching of a body-muscle. In his view, plaintiff suffered from angina of effort to which must be attributed the reduced efficiency of the heart.

Dr. E. B. Gunson examined plaintiff on November 28, 1936, December 9, 1936, and September 3, 1937. In his view, the case was one of “angina pectoris pure and simple.” For some time prior to October, 1936, plaintiff had a diseased heart, but there was no indication of this until the accident. As he was exerting himself to move the drum he suffered angina of effort. There was no coronary thrombosis; but as angina pectoris, by reducing the reserve power of the heart, predisposes to coronary thrombosis, if this condition did occur subsequently, it must be regarded as a sequel of the accidental injury. In support of this view, he quoted a passage in a letter received from Dr. Paul White of Boston, which reads:

Finally I believe you are right that a delayed effect of fatigue may be responsible for thrombosis in a narrowed coronary.

He thought that the pre-accidental condition of plaintiff's heart was such that despite the accident he would have broken down in twelve months. In his summary of evidence, *O'Regan, J.*, quotes *Dr. Gunson's* own words thus: “This is a clear-cut case “of angina of effort of which the effect is to make him incapable “of further effort without the induction of pain. My experience “of angina is that once it has been induced the victim is never “capable of his earlier degree of effort. What happens in a heart “as the result of angina is theory. Nobody knows what happens “in a heart. What we do know is that effort brings on angina “and that after angina a man is never the same again.” He dismissed *Dr. Roche's* theory as speculative.

Dr. J. E. Coughy, who examined plaintiff on January 15 and twice subsequently, concluded that he was suffering from angina pectoris. He believed that prior to the strain plaintiff's heart was unhealthy as a result of disease in the coronary arteries. The

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fact that X-ray revealed an area of calcification in the heart, suggesting the presence of an old-standing thrombosis, supported his view. The effort reacting on an unhealthy heart induced a typical attack of angina pectoris. His reasons for diagnosing angina and opposing a diagnosis of coronary thrombosis were: That plaintiff at once sat down and remained at rest when the pain came on, restlessness being a characteristic feature of thrombosis; that the pain passed as soon as plaintiff came to rest, in thrombosis the pain is prolonged; that subsequent attacks of pain were relieved by nitrites, in thrombosis nitrites do not relieve; that angina is induced by effort as here, whereas thrombosis has little, if any, relation to effort; that vomiting did not accompany the first attack, in thrombosis vomiting is a typical feature; that the recurrent attacks tend to confirm the view that the attacks have been anginal in that the first attack reduced the tolerance of the heart for effort and every subsequent attack has had the same effect. In his view the precipitating cause of plaintiff's breakdown was the effort. Precisely what happened to the heart, and what the exact mechanism of the damage, was a matter of speculation. Probably some change in the heart's substance comparable to that which occurs in the toxic heart of athletes—viz., stretching and swelling of muscle with subsequent fibrosis. This would explain the initial attack of angina; but the subsequent attacks were, in his opinion, largely due, and he would stress the point, to a lowering of plaintiff's threshold for anginal pain brought about by a state of nervous apprehension induced by the first attack. He had previously reported that the recurrent attacks of pain were due to a state of anxiety neurosis induced by an attack of angina. If the cause of the damage was as Dr. Roche suggests, there would be signs of congestive heart-failure.

Medical Evidence for Defendant :—

Dr. C. H. Tewsley examined the plaintiff on April 12, 1937. Plaintiff described the initial pain to him as sharp and momentary, and mentioned slight momentary pain occurring between 2 p.m. to 3 p.m. He did not mention pain on the way home; but at 4.30 p.m., after reaching home, he was seized with a severe pain behind the breast-bone, which lasted five or ten minutes. After Sunday in bed, on Monday the pain was induced by the slightest effort. He had it walking along the wharf to his work, and it recurred periodically all the morning, incapacitating him. When in bed after visiting Dr. Dreadon

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plaintiff had severe pain lasting five to ten minutes, especially after eating, and had these discomforts in the chest up to the time of his admission to hospital. Since leaving hospital he had been getting pain in the chest on effort, relieved by rest, and shortness
5 of breath on effort. On examination Dr. Tewsley found a pulse-rate of 108, the blood-pressure was 102/80, and the heart-sounds were of quite fair intensity. His interpretation of these symptoms was that while plaintiff was doing his work a thrombosis began to form and the subsequent symptoms were attributable to this;
10 that during the period of rest in bed the thrombosis extended, and that later a second thrombosis occurred. The anginal pain on effort was secondary to the thrombosis. He would not allow that angina of effort *per se* would give the clinical picture presented. It would not produce a man who looked ill and had
15 a fast pulse. It does not lessen cardiac reserve or conduce to thrombosis. Minor degrees of thrombosis do not show the symptoms characteristic of a major attack. He rejected Dr. Roche's theory of stretching of the muscle by over-distension of the heart. Dilatation does not necessarily injure the heart.
20 Moreover, there was no evidence of dilatation in this case. In his opinion, claimant did not break down as a result of the effort made.

Dr. H. McDowell, who examined plaintiff on April 12, 1937, stated that the history he elicited agreed more or less with that
25 given in Court. Plaintiff did not mention pain occurring on his way home, but a pain which came on when he reached home and continued for some time. In his opinion, the attack of pain at 11 a.m. on October 17 was not angina of effort. He was doubtful of the cause of the pain. Even after hearing the evidence in Court
30 he was undecided as to whether the pain were due to a minor coronary thrombosis or to strain of a somatic muscle. On the evening of October 17 something happened which completely disabled him. There could be only one explanation of this rapid gross alteration in the capacity of his heart—*viz.*, coronary
35 thrombosis. He believed that on the evening of October 17, and possibly again sometime later, plaintiff sustained one or more coronary thromboses. The recurrent attacks of angina experienced subsequently were due to the fact that he had had a thrombosis. He saw no reason for thinking that the attack of pain at 11 a.m.
40 on October 17 was responsible for plaintiff's present condition. He rejected Dr. Roche's theory.

Dr. T. W. J. Johnson examined plaintiff on November 8, 1936, and again on May 10, 1937. He found evidence of

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myocardial degeneration. The heart was slightly enlarged, the rhythm was normal, the sounds of poor quality, the pulse-rate 90, and the blood-pressure 150/80. An attack of anginal pain occurred in the course of his examination. Plaintiff described his symptoms at 11 a.m. on October 17 as a momentary rush of blood through the chest. In Dr. Johnson's view the symptoms that appeared at 11 a.m. were induced by the effort and were probably something in the nature of angina. From 11 a.m. till 4 p.m. plaintiff felt nauseated, and at 6 p.m. he developed an attack of coronary thrombosis. The nausea felt during the afternoon was a prodromal symptom of the thrombosis at 6 p.m. When the plaintiff ceased work at 4 p.m., there was no gross change in his heart that would have prevented him resuming work on Monday or since. Had he not had the attack of thrombosis on Saturday evening, he would have been back at work on Monday. The presence of pericardial friction on his admission to hospital indicated that he had had a recent coronary thrombosis. His subsequent incapacity was due to coronary thrombosis, and cannot be regarded as a sequel to the anginal attacks on October 17, 1936, for angina of effort induces no permanent change in the heart-muscle. In support of this statement he referred to a personal communication from Sir Thomas Lewis regarding the effect of angina of effort upon the heart. The actual wording of Sir Thomas Lewis's letter is as follows:—

1. If a man while at work or exercise develops typical cardiac pain which passes off as soon as the exertion ceases, then he is a case of angina pectoris, and we rightly conclude that his myocardium is unequal to the work required of it.

2. I do not believe that pain induced by effort in this way changes the heart to a degree that can be recognized subsequently. It does change the heart temporarily, as is shown by change in the electrocardiogram.

3. There are many men who experienced anginal pain week after week for many years, and seem no worse at the end than at the beginning. The problem is the same as the ischaemic muscle in the leg.

4. The attack of pain has, so far as we know, no effect on the size of the artery supplying the muscle or the muscle itself. The event is too short in duration to have any appreciable result from this point of view.

The Auckland Hospital Record:—

The information derived from this record is that plaintiff was admitted to hospital on November 4 on a note of admission from Dr. Dreadon, which states: "Strained chest three weeks ago—has had persistent tachycardia since, substernal pain on lying down and on exertion—aggravated by food; ? heart strain; ? rupture of diaphragm with herniation of stomach." The history recorded is admittedly incorrect. The results of Dr. Wilson's examination of the circulatory system are noted as

- follows: "Apex beat not palpable. Sounds poor in tone in all
 "areas, though fairly loud; no bruits; almost tic-tac rhythm.
 "Sounds are rapid; faint pericardial rub just to the left of the
 "lower part of the sternum; arteries firm, but not hard; not
 5 "tortuous; no undue filling of veins; blood-pressure, 150/80."
 The other systems are stated to be negative, and the Wassermann
 reaction negative. The temperature-chart shows a range
 of temperature between 97 degrees and 98.4 degrees. The
 pulse-rate is recorded thirty-six times. The average rate being
 10 87.1. The respirations are recorded as 20 per minute throughout.
 The urine gives: Specific gravity, 1010; albumen, nil. The
 treatment-chart shows sedative prescriptions (Pot. Brom.;
 Luminal), tablets of trinitrin grs. 1/100 when needed, Sippy
 powder thrice daily half an hour before food; and the instructions
 15 for nursing are absolute rest apart from self-feeding. There is
 a note of progress dated November 12, 1936, which reads: "No
 "pain for some days. Last attack was severe and immediately
 "followed psychological excitement. Trinitrin brought quick
 "relief." And another dated November 22, 1936, reads: "No
 20 "further attacks. Has decided to continue resting at home;
 "discharged." There is an electrocardiogram with a report signed
 "E. H. Roche," which reads: "P.R. interval, 0.18 second.
 "Q.R.S., 0.06 second. Conduction normal. Lead 1 shows
 "inverted T wave with slight depression of S.T. below isoelectric
 25 "line. Leads 2 and 3 are normal. There is marked left
 "ventricular preponderance. The appearances in Lead 1
 "constitute doubtful evidence of myocardial damage. The end
 "of the T wave occurs half-way between the Q.R.S. complexes
 "which indicates a prolonged systole or tic-tac rhythm. This
 30 "gives a support to the appearances in Lead 1 and indicates
 "definite myocardial degeneration."

Radiologist's Report:—

In this report the following observations may be noted:—

- "*Diaphragm*: The left side of the diaphragm is partially
 35 "obscured by changes in the cardio-phrenic angle. The movement
 "of the left side is somewhat poor.

- "*Heart*: There is some diminution in the retro-cardiac space
 "suggesting slight enlargement of the left side of the heart. In
 "the antero-posterior view no abnormality of heart size or shape
 40 "is visualized. On the right cardiac border there is a dense,
 "calcified, plaque measuring 5 millimetres thick by 5 centimetres

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"long. This calcification is situated anteriorly rather than
"posteriorly.

"*Oesophagus* : There is a slight backward displacement of the
"retro-cardiac portion.

"*Stomach* : The stomach is radiologically normal in size, shape,
"and position. No evidence of herniation of the abdominal
"viscera through the diaphragm is detected in either the erect or
"recumbent positions.

"*Conclusions* : These findings would support clinical evidence
"of cardiac pathology. It is difficult to establish whether the
"calcification on the right side is in the myocardium or
"pericardium, though the latter is more likely. This would to
"a certain extent be supported by the changes in the left-cardio-
"phrenic angle, which might be pleuro-pericardial in nature."

There are some observations of abnormal pulsations of the
heart as revealed by the kymograph; but as these are not
confirmed by the clinical examination or by the electrocardiogram,
they are of no interest.

Discussion :—

This case presents one of those complex problems of coronary
insufficiency, relative or absolute, that are sometimes insoluble
except by *post mortem* examination. The picture is not that of
frank angina pectoris, nor that of frank acute coronary thrombosis.
It delineates features of each and is typical of neither.

The question at issue is : Was the plaintiff incapacitated by
disease alone, or by disease and employment taken together ?
Was it disease that did it, or did the work he was doing help in
any material way ? (*Lord Loreburn*(1)).

The medical evidence does not show that witnesses made it
clear to the Court that angina pectoris and coronary thrombosis
owe the same cause, are offspring of the same parent, the one a
symptom, the other a complication of a degenerative disease of
the coronary arteries, which supply the blood to the heart. They
speak of them as if they were widely separate clinical entities
having little, if any, causal relationship with one another; and
witnesses for the plaintiff present angina pectoris as if it were an
actual disease capable of producing changes in the heart that
impair its efficiency.

Perhaps it will make the significance of the evidence clearer
to the Court and facilitate discussion if I give a brief account of
coronary disease and of the effects it produces.

(1) [1910] A.C. 242, 247; 3 B.W.C.C. 275, 281.

This degenerative disease, of unknown origin, is a more or less natural feature of the post meridian period of life, though occasionally it may appear earlier. In its slow insidious progress it causes narrowing of the coronary vessels even to the point of

5 complete obstruction, roughens and ulcerates their inner lining, destroys their power of contraction and relaxation, indeed may convert them into bony tubes. The disease does not necessarily involve all the vessels equally. Some are affected in lesser degree, some may escape altogether. Since the degenerative process is

10 a very gradual one, there is a tendency for new vessels to form and replace or supplement the function of the diseased ones. This anastomosis or compensatory circulation as it is called, also a gradual process, has an important influence in maintaining the health of the heart-muscle, which looks to the coronary vessels

15 for nourishment. If anastomosis is free, and it occurs more freely in labourers, where the heart is daily activated, than in sedentary workers, the heart-muscle may suffer little, and this explains the appearance of good health in some cases, as here, up to the moment of catastrophe. It also explains the variability of the symptom

20 angina pectoris and of the symptoms that attend the complication coronary thrombosis. If anastomosis is less free, the heart-muscle slowly fibroses and symptoms appear so gradually and so like those displayed by a healthy man out of condition that the victim does not regard the slight breathlessness and undue fatigue on exertion

25 as pathological and dismisses them as unimportant, if indeed he reflect about them at all. They are not noticed by casual observers, and even when the subject is under critical examination are disclosed only by strict and painstaking inquiry. Meantime the disease in the coronary vessels slowly advances. The blood-

30 supply to the heart becomes more and more restricted until a stage is reached where the victim is at the trigger-point of dramatic symptoms. He may suffer angina pectoris—a symptom of relative coronary insufficiency; he may develop coronary thrombosis—a cause of absolute coronary insufficiency.

35 *Relative Coronary Insufficiency* :—

Angina Pectoris : With angina pectoris, Heberden's angina, angina of effort, anything that stimulates the heart to increased activity pulls the trigger. The stimulus is usually sustained effort, not necessarily unusual or extreme; the effort of walking up an

40 incline previously surmounted with ease, of hurrying with a suitcase to a train, or cranking a cold motor-car. Sometimes the stimulus is emotional—a sudden burst of temper. The symptom

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may be anything from a sense of oppression behind the breast-bone to severe, agonizing, substernal pain, which may or may not radiate to the arms or elsewhere. The more severe the stimulus required to elicit the symptom the less advanced is the disease in the coronary arteries, or the more free the anastomosis, or the less damaged the heart, or the more unstable the nervous system. The symptom is more readily elicited when the stimulus is applied shortly after a meal. 5

An extremely important matter is consistency in the history of the response to effort. It is the rule that there is a given tolerance of work, constant within narrow limits. Patients with this malady do not relate that on one day the attack is brought on only after walking briskly, and that on the next it occurs spontaneously while the patient is resting quietly and undisturbed. Single inconsistencies of this kind in the history may be explained occasionally by differences in external temperature or excitement or fullness of stomach; but where these inconsistencies are obvious and frequent the case is rarely one of Herberden's angina pectoris. In angina of effort the pain of a given grade recurs with the repetition of a particular act [1]. 10 15

The pain, which is steady in character, not sharp or throbbing, disappears shortly after the subject comes to rest, or is relieved by nitrites; and it leaves the heart as it found it. Not by a jot does it aggravate, advance, or affect the underlying disease, or injure the heart (*vide* Dr. Johnson's quotation from Sir Thomas Lewis), and the subject is in every way as well after as he was before the pain appeared, capable of making any effort short of that which produced the pain. Contrast this account with plaintiff's story: His initial pain, induced by extraordinary effort, recurs with lesser and variable degrees of provocation. From the onset he looks ill and sickly, is in large measure incapacitated and is never the same man again. 20 25 30

As the underlying disease in the coronary arteries advances, or the integrity of the heart-muscle diminishes (and if the patient does not die suddenly from ventricular fibrillation or the incidence of coronary thrombosis), less and less effort or emotional disturbance is effective in eliciting the symptom, until, finally, pain follows the slightest effort, even the effort of swallowing, and occurs when the patient is lying in bed making no obvious effort at all. The precise mechanism of the pain is not certainly known. It is known, however, that when the muscles of a limb are made to work in the absence of a sufficient blood-supply pain is induced, and it is inferred that what happens in a limb happens in the heart. Presumably there are other factors, a nervous factor for one; but what concerns us more is the fundamental cause of the symptoms. White writes:— 35 40 45

The mechanism of angina pectoris is unknown, but it appears to be primarily dependent on absolute or relative insufficiency of the coronary

circulation giving rise to myocardial anoxaemia. Just how this acts on the nerve endings is not yet clear. . . . The more the coronary circulation is limited, the less exertion is needed to cause angina pectoris [2].

Again :

- 5 The immediate cause of angina pectoris is almost certainly insufficiency of the coronary circulation, and inability to maintain a blood-flow to the myocardium capable of supporting it under greater or lesser strain or even under the usual effort of quiet existence [3].

- 10 This is not an isolated opinion. It is supported by Lewis [4], and all the recent writers I have been able to lay under contribution. References to the literature must be recent for knowledge, has advanced considerably in the last decade, and medical opinion of the fundamental cause of angina pectoris has narrowed and crystalized.

- 15 In the vast majority of cases (at least 95 per cent.) there is some coronary disease usually sclerosis and narrowing, especially involving the descending branch of the left coronary artery [5].

- The remaining 5 per cent. of causative factors of angina pectoris include syphilitic aortitis, marked aortic regurgitation or stenosis, 20 and a severe grade of anaemia ; but as these conditions have been eliminated in the present case, they do not concern us. Here we are dealing with effects of coronary insufficiency, relative or absolute, only.

- Examination of the circulatory system in the 95 per cent. of 25 cases of angina pectoris due to coronary insufficiency the blood-pressure is usually high and may rise higher during the attack. The heart may or may not show enlargement, depending upon the degree to which degenerative changes in the heart have occurred, or upon the occurrence of a previous infarction of the heart. There 30 are no murmurs. The heart-sounds are of good quality and may be intensified. The pulse-rate is rarely affected. It does not usually rise during, or after, the attack. The electrocardiogram may be normal, or may show changes indicative of coronary sclerosis : during an attack the features characteristic of coronary 35 thrombosis may appear temporarily. The appearance of the patient is not altered. During an attack his face may register pain, but he does not look flushed, or ill, or sickly. When the attack has passed off he looks himself.

- In angina pectoris where the heart is not obviously diseased 40 the history alone may give the diagnosis ; and when there is doubt a high blood-pressure, or changes in the electrocardiogram indicative of coronary disease, confirms it. In the present case it is quite clear from the history alone that plaintiff suffered attacks of angina pectoris ; but there appears to be more to it 45 than that.

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The Effect of Strain: It will be clear from the statement above that effort or strain does not cause angina pectoris in the sense that it may cause the breaking of a rope. It merely induces the symptom of pain, which is a protective symptom. The strain creates a demand by the heart for more blood than its diseased vessels can supply. The heart protests, cries for help, signals pain. That is angina pectoris. The heart will not signal again until a similar demand, equally impossible of fulfilment, is created. A man who has suffered angina pectoris should not again do heavy labour not because angina pectoris has produced any effect that makes heavy labour inadvisable, but because the heart has used pain—i.e., angina pectoris—as a signal to let it be known that it is unequal to the demands that heavy labour creates. It has been reduced to this degree of incapacity by the underlying disease in the coronary arteries, which is not affected by strain.

Absolute Coronary Insufficiency:—

Coronary Occlusion: In the course of coronary sclerosis, or atherosclerosis, as it is more correctly called, a diseased vessel may become completely blocked. This is called coronary occlusion. The occlusion may result from the disease process alone, the vessel blocking much as a gas or water pipe does by corrosion; or the blocking may be caused by the formation of a clot on one of the ulcerated patches mentioned as occurring on the inner lining of the diseased vessels. This is called coronary thrombosis. In either case since a vessel which normally supplies blood to a certain area of the heart-muscle is blocked, the muscle, completely deprived of blood, dies and undergoes necrosis. The segment of dead necrosing muscle is called an infarct, and the patient is said to be the subject of cardiac infarction. Infarction can also occur as the result of extreme narrowing of a vessel without actual occlusion. I point these distinctions because the symptoms of infarction of the heart vary with the way in which infarction is produced, and this has a bearing upon the present case. With extreme narrowing of a coronary vessel an infarct may form without producing any symptoms at all; but the damage done to the heart-muscle makes the occurrence of angina pectoris, which was already in the offing, more likely. This is exemplified in the case of *Harvey v. E. and H. Craig, Ltd.*(2), where Harvey went to work with a recent cardiac infarct of which he knew nothing and in the course of the morning suffered a typical attack of angina pectoris on attempting to lift a bale of

sacks. (This in effect was the first symptom of the infarction.) The pain was relieved by a few moments' rest, and would have been relieved by nitrite had he taken it, and he then went on with his work. He died two or three hours later without displaying
 5 further symptoms. *Post mortem* examination revealed extensive coronary disease and a cardiac infarct twelve to twenty-four hours old caused by extreme narrowing of a vessel without actual occlusion.

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It is very likely that some of the characteristics of the acute form may be
 10 lacking . . . when cardiac infarction develops as a result of gradual narrowing of the coronary arteries without any true thrombosis [6].

On the other hand :

When there is marked narrowing of the coronary arteries without actual occlusion angina pectoris and sudden death are quite common; the
 15 myocardium itself may or may not show fibrosis or areas of infarction in such cases [7].

These antithetic statements serve to illustrate the complexity of the problems presented by coronary disease.

When occlusion occurs as a result of the disease process alone,
 20 symptoms are less dramatic than when a patent artery is suddenly blocked by a blood-clot, because the occluding process is a slow one and there has been time for compensatory circulation to be established.

Coronary Thrombosis: If the patient survive the immediate
 25 onset, the symptoms that attend the blocking of a vessel by blood-clot depend upon the size of the vessel occluded, the rate of clot-formation, and the adequacy of the compensatory circulation. The occurrence may be heralded for days, weeks, or months by attacks of angina pectoris which the patient often, and the doctor
 30 sometimes, mistakes for indigestion; or it may come like a shot from a gun. If a clot forms quickly in a large artery, the symptoms are dramatic and well known. They make the picture of coronary thrombosis as drawn in text-books, where less reference is made to manifestations of minor degrees of coronary occlusion.
 35 The dominant symptom is pain of the same location, radiation, and steady character, as in angina pectoris, but as a rule it is more intense and more enduring. It may last hours, days, or weeks in diminishing intensity, though more often it is shorter than this. It is not amenable to nitrites, for the pain does not depend
 40 only on a deficient blood-supply, but also upon the actual damage done to the heart by the formation of an infarct. The second striking feature of acute coronary thrombosis, which differentiates it entirely from angina pectoris, is the appearance with the pain

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of symptoms caused by sudden damage to the heart, which diminishes its output, such as shock and dusky cyanosis in severe cases ; faintness, dizziness, extreme weakness, feeble pulse, feeble heart-sounds, and sudden fall in blood-pressure ; or the sudden appearance of symptoms of congestive heart-failure due to dilatation of the heart [8]. 5

But it is not the dramatic symptoms of acute coronary thrombosis that are of interest here, for obviously they are not present. To use their absence as an argument against the occurrence of cardiac infarction is unreasonable for : 10

Sometimes thrombosis . . . , if slow in development, may occur with a different clinical picture from that ordinarily labelled thrombosis, and even clinically recognizable acute myocardial infarction may assume a variety of pictures [9].

Again : 15

If coronary narrowing and obstruction and even cardiac infarction develops slowly and there is no excessive cardiac strain, there may be no symptoms at all though there be areas of damaged muscle and one or both coronary arteries occluded. The reserve strength of both myocardium and its blood-supply is very great and not easily exhausted. If, however, sudden occlusion of a large coronary artery occurs with inadequate coronary anastomosis, the symptoms may be extreme with terrible pain, shock, and sometimes death. Between these two extremes of symptoms in coronary heart disease from none at all to those that are overwhelming there may be all grades of varieties [10]. 20 25

As a rule coronary thrombosis is preceded by attacks of angina pectoris, and is frequently followed by angina :

An attack of coronary thrombosis may initiate a typical course of angina pectoris [11].

It more often than not occurs in persons who have a high blood-pressure : 30

A previously existing hypertension is probably the most common single etiological factor in the development of coronary thrombosis [12].

In its minor forms it may be very difficult to diagnose. The pain may not be severe : 35

It may consist of a dull ache or an uncomfortable gnawing sensation in the chest that does not prevent the patient from continuing his work [13].

The clot may form, first, in a small vessel producing only minor symptoms that do not completely incapacitate the patient, and then gradually extend back along the vessel occluding other branches, and as more and more of the heart-muscle becomes infarcted the symptoms increase in severity and the patient becomes totally incapacitated. 40

When the history is unconvincing, and characteristic symptoms wanting, diagnosis is difficult ; and then great importance attaches to the blood-pressure, the intensity of the heart-sounds, the electrocardiogram, and the presence of pericardial friction. 45

When an infarct forms, the heart is at once crippled in greater or less degree depending upon the extent of the damage to the

heart-muscle. Consequently, the cardiac output is diminished, and therefore the blood-pressure falls. The fall may be quite sudden, or gradual over a day or two. This sign is the more helpful when the previous blood-pressure is known, for a patient with a blood-pressure previously high may after a thrombosis have a systolic pressure of 150 which really represents a considerable fall; but which, in the absence of knowledge of previous hypertension, may appear relatively high, and is misleading. Conversely, where the diagnosis is otherwise certain, a blood-pressure of 150 bespeaks previous hypertension. But where the previous blood-pressure is not known, a relatively very low blood-pressure in a man of middle-age makes for diagnosis, as does also a steady fall over a day or two.

With the present case the previous blood-pressure was not known and was recorded subsequently on three occasions only. Eighteen days after the strain the reading was 150/70; five days later, 170/80. The presumption is that if infarction of any appreciable extent had occurred plaintiff's blood-pressure must have been high previously. Six months after the strain the blood-pressure is given as 102/80. This is difficult to reconcile with the former readings unless on the assumption that in the interval plaintiff's heart had failed considerably. In this case the blood-pressure readings do not help to a diagnosis of cardiac infarction.

The quality of the heart-sounds is stressed as of considerable diagnostic importance.

The sounds are almost always muffled or distant. This is particularly true of the first heart-sounds heard at the apex. On several occasions it was actually found absent, while a distinct second sound could be heard [14].

And again:

The significant change is the muffling of the sounds but particularly of the first heart-sound [15].

In most cases a gallop rhythm is present, or a tic-tac rhythm may be heard.

In the present case three references to the quality of the heart-sounds are made. Dr. Wilson, on plaintiff's admission to hospital, describes the heart-sounds as "poor in tone in all areas" though fairly loud," an equivocal statement. Dr. Johnson describes them on November 8, 1936, as of "poor quality," and Dr. Tewsley on April 12, 1937, as of "quite fair intensity." Both Dr. Wilson and Dr. Roche state that a tic-tac rhythm was present. Dr. Johnson's statement that the sounds were of poor quality when he examined plaintiff in hospital is of diagnostic significance.

The electrocardiogram may be of the very first importance in diagnosis. The changes may be so characteristic that the

diagnosis can be made confidently without any further knowledge

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of the patient. On the other hand, the electrocardiogram may be normal, or may show changes not of themselves diagnostic, but confirmative of a diagnosis if other features of the case are suggestive. The characteristic changes in the graph, which point certainly to cardiac infarction, occur early in the course of the case and may disappear in a few hours or a few days; but with the recent introduction of the fourth, apical, lead a confident diagnosis of previous infarction may now be made months after the event. Considerable value attaches to a series of electrocardiograms for an

important feature of the electrocardiogram is the fact that complexes change their form from day to day. There is practically no other condition in which the form of the electrocardiogram changes materially from day to day or at least goes through such significant changes so quickly as occurs in coronary thrombosis [16].

Unfortunately, in this case only one electrocardiogram was taken, and that twenty-three days after the onset of symptoms. No fourth lead was used.

Without entering upon technical details it may be said that the abnormal features in the electrocardiogram described by Dr. Roche would confirm a diagnosis of cardiac infarction in a case where the history was suggestive. The left-axis deviation mentioned by him is within normal limits for a man of plaintiff's age, and is negligible.

Pericardial friction, when present, confirms a diagnosis of cardiac infarction, and bespeaks a considerable infarction of the anterior part of the heart. It is usually associated with grave symptoms. It appears in only a minority of cases—13·8 per cent.—in Levine's experience. It may appear within a few hours of the attack;

but usually on the second or third day of illness and is usually transient, disappearing in a day or two—rarely it lasts for weeks [17].

In the present case at a consultation between Dr. Wilson and Dr. Roche, three weeks after the strain, Dr. Wilson heard faint pericardial friction. Dr. Roche did not. In cross-examination Dr. Roche accepted Dr. Wilson's observation of pericardial friction. If the Court holds the presence of pericardial friction as proved, it affords certain evidence of myocardial infarction; but probably, as Dr. Roche insists, infarction of comparatively recent formation.

Effect of Strain: It is the established practice of the New Zealand Court of Arbitration to regard strain as having no effect in producing coronary thrombosis. There seems to be sound physiological reason for this view, and no convincing evidence can be set against it. Of the text-books and monographs consulted, in only one is strain advanced as a possible causative

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factor. In *Trauma and Disease* [18] where the article on coronary thrombosis is written by Paul White and Kahn, the opinion is expressed that "trauma or strain" may "in infrequent cases" cause coronary thrombosis, possibly by rupturing an atheromatous abscess or breaking a calcified plaque; but they offer no explanation of how this may come about. White, in his own text-book, *Heart Disease* [17], makes no reference whatever to this view, and does not mention strain as an etiological factor. All writers are agreed that there is no evidence that strain affects the underlying coronary disease.

In an article in the *Journal of the Mount Sinai Hospital* [19], an analysis is made of the circumstances attending the onset of four hundred and fifty-two attacks of coronary thrombosis. They found that:

- 15 20.8 per cent. occurred while at rest, 19 per cent. during sleep, 18 per cent. while walking, 13.5 per cent. during mild activity, 4.6 per cent. during moderate activity, 0.9 per cent. with unusual or severe exertion, 4.8 per cent. during or after a meal, 5.5 per cent. during excitement, 6.8 per cent. post operative, and 2.2 per cent. following infection. The remaining 3.7
- 20 per cent. comprised eight cases in which thrombosis was unattended by any symptoms and nine cases characterized merely by an increase in the frequency and severity of a pre-existing anginal syndrome.

They conclude that

- 25 there is no one factor or group of factors responsible for the onset of an attack of coronary thrombosis. It may develop during the patient's routine of daily life and the apparent association of an attack with some external condition is merely coincidental.

- The Present Case:* In this case there is a history of previous good health; of a momentary extraordinary effort made after
- 30 three hours' heavy, but ordinary, work; of a sharp pain across the lower part of the chest at the moment of effort, which subsided quickly with rest; of immediately subsequent incapacity with great weakness and a strange feeling in the chest, of pallor, of recurrent attacks of anginal pain relieved by nitrites, but bearing
- 35 no quantitative relation to effort, and of ingravescient illness necessitating plaintiff's admission to hospital eighteen days later. Two days after the effort the pulse-rate was 120 and the heart slightly enlarged. On admission to hospital the pulse-rate and temperature were normal and remained so throughout the period
- 40 of detention; the blood-pressure was 150/80, and five days later 170/90; the heart was slightly enlarged, the heart-sounds of poor quality and a tic-tac rhythm was present; of two physicians in consultation one affirmed the presence of faint pericardial friction, the other denied it. An X-ray suggested slight enlargement of
- 45 the left side of the heart, and showed a calcified plaque on the right side, but whether this was in the pericardium or in the heart's

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substance was doubtful; an electrocardiogram taken three weeks after the effort was consistent with a diagnosis of cardiac infarction; six months after the strain the blood-pressure was 102/80, the heart-sounds of quite fair intensity, and there was pain in the chest and shortness of breath on exertion. The present condition is one of incapacity caused by anginal pain on slight exertion.

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Medical Evidence for the Plaintiff:—

Dr. Gunson on these facts diagnoses "angina pectoris pure and simple" caused by the effort of pulling upon the drum, and he ascribes plaintiff's subsequent incapacity to his belief that angina pectoris reduces the reserve power of the heart. It must be clear in the light of the carefully authenticated account of angina pectoris given above that Dr. Gunson's diagnosis of angina pectoris does not cover all the facts, and that his assertion that angina pectoris reduces the reserve power of the heart is misleading in that angina pectoris is not a cause, but merely a symptom, of heart-failure. He is satisfied that coronary thrombosis did not occur at the time of the effort, but if it occurred subsequently, and it is not clear that he thinks it did, he would regard it as a natural sequence of the effort, for this induced angina pectoris, and angina pectoris leads to coronary thrombosis. His theory that angina pectoris leads to coronary thrombosis overlooks the fact that it is not angina pectoris that leads to coronary thrombosis but the underlying disease in the coronary arteries. His quotation from Dr. Paul White of Boston, adduced in support of his theory, is valueless without the content of his own letter and the context of White's. It would appear that the subject of his letter was the effect of fatigue in inducing coronary thrombosis; but angina pectoris does not induce fatigue, and undue fatigue does not appear suddenly in a man who previously has shown no fatigue unless his heart has sustained some damage, and angina pectoris does not damage the heart. Dr. Gunson thinks that despite the strain plaintiff would have broken down in a year. I am at a loss to know how he determines this interval—it appears to be a speculative inference from the fact that plaintiff had an anginal attack; but "angina pectoris pure and simple" may recur for many years without completely incapacitating the subject. Dr. Gunson's statements are not supported by reference to recent medical literature.

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Dr. Roche also, on these facts, diagnoses angina pectoris, and also holds that angina pectoris reduces the reserve power of the

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heart; but he adds a theory of muscle-stretching that must be noticed. In elaborating this theory he calls upon some experimental work of Grimes undertaken to show the effect of variations in intrathoracic pressure upon arterial tension—an aim that Dr. Roche overlooks. Grimes is in no sense an authority upon the heart. He merely made a practical application of the well-known Valsalva experiment to ordinary working-conditions in order to demonstrate that efforts such as lifting weights, pulling strenuously, striking blows with a heavy hammer, which are necessarily made with the breath held, raise the intrathoracic pressure. This rise in intrathoracic pressure depletes the heart and so reduces the blood-pressure. When the intrathoracic pressure is relieved by the resumption of breathing, the abrupt refilling of the heart by the blood temporarily dammed back in the veins raises the blood-pressure 25 millimeters or more above normal. This experimental work of Grimes was quoted by the Medical Referee in *Wy nyard v. Daily Telegraph*(3) to show that some of the work done during a certain period was not light work. Dr. Roche pictures the inrush of blood in this experiment as causing such extreme distension of the left ventricle of the heart that the muscle is stretched to a degree sufficient to impair permanently its power of contractility. He dismisses as negligible the brake to this distending inrush of blood afforded by the right heart and lungs, and overlooks the fibrous pericardium especially provided to prevent undue distension of the heart. Even were Dr. Roche's theory of muscle-stretching tenable, he overlooks the fact pointed out by Dr. Caughey, that the dominant symptoms induced would be those of acute congestive heart-failure. These the plaintiff did not show. All other medical witnesses dismiss Dr. Roche's theory, which is not Grimes's theory, and so do I. Dr. Roche is definitely opposed to the idea that the initial pain was due to coronary thrombosis because it was of short duration and was relieved by rest. He grants that coronary thrombosis may be painless, but asserts that if pain do occur it is prolonged. Quotation from authority in the account of coronary thrombosis given above shows that Dr. Roche's all-or-nothing conception of the pain in coronary thrombosis is mistaken. The character of the pain depends, as do other symptoms, on the rate of clot-formation and upon the size of the vessel occluded. Dr. Roche considers that plaintiff's working-life has been shortened by two years; but, since he has given his opinion that before the strain plaintiff's heart was in fairly good condition, I cannot

(3) [1934] N.Z.L.R. s. 137; G.L.R. 389.

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see how he makes that computation, unless on his theory of muscle-stretching which has been shown to be fallacious.

Dr. Caughey also diagnoses angina pectoris, and is the only witness who refers to disease of the coronary arteries; but he does not make as much use of the reference as he might have done. He attributes previous ill-health of the heart to coronary disease, and sees in the calcified plaque, shown by X-ray, evidence of long antecedent coronary thrombosis due to coronary disease; but he does not call coronary disease to account for causing the angina pectoris, nor suggest that coronary disease might have caused a recent infarction of the heart which might explain the whole case. He denies coronary thrombosis as a possible cause of plaintiff's subsequent incapacity because he did not show symptoms characteristic of rapid clot-formation in a large coronary artery, which is a specious argument, for we are not concerned here with the manifestations of typical acute coronary thrombosis. In his view, the precipitating cause of plaintiff's breakdown was the effort of pulling upon the drum, and though not prepared to state precisely what the mechanism of the heart-damage was, he offers, as a possible explanation, the suggestion that plaintiff's effort caused changes in the heart's substance comparable to those said to occur in the toxic heart of athletes—viz., stretching and swelling of muscle with subsequent fibrosis. This appears to be *Dr. Roche's* theory without *Grimes*. *Dr. Caughey* makes a valuable contribution in suggesting that plaintiff's continued incapacity may be explained in part as due to an anxiety neurosis. This he holds would explain the frequent recurrences of anginal pain and the quantitative inconsistency of the pain to effort, each attack lowering plaintiff's threshold for anginal pain. *Dr. Caughey* is a neurologist and his neurological views command respect.

This concludes the medical evidence for the plaintiff. That plaintiff suffered attacks of angina pectoris of an atypical kind is indisputable; but that the angina affected in any way the heart's structure and reduced the cardiac reserve cannot be accepted. Plaintiff's incapacity subsequent to the effort must have been due to some damage to the heart-muscle sustained either before or at the time of effort. The nature of this damage, how and when produced, has not been explained satisfactorily by witnesses for the plaintiff.

Medical Evidence for the Defendant:—

Dr. Johnson thinks that the initial symptom was something in the nature of angina caused by the effort and attributes

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plaintiff's persistent incapacity to coronary thrombosis occurring after plaintiff reached home on the evening of October 17. The symptoms that appeared immediately subsequent to the effort and lasted throughout the day, which he epitomizes as nausea, 5 he regards as prodromal to the attack of thrombosis in the evening. But this view takes no account of the extreme weakness which in great measure incapacitated plaintiff throughout the afternoon. Extreme weakness is neither a sequence of angina pectoris nor a prodromal symptom of coronary thrombosis, and nausea does 10 not incapacitate. The weakness implies a diminished cardiac output which in turn implies some damage to the heart-muscle. Dr. Johnson believes that when plaintiff ceased work at 4 p.m. on Saturday there was no gross change in the heart that would have prevented him from returning to work on Monday; but 15 plaintiff's account of his condition on Saturday afternoon, which is corroborated by his workmate, Redfern, does not make this seem at all likely. His inability to return to work on Monday Dr. Johnson attributes to coronary thrombosis occurring at 6 p.m. on Saturday; but there is no clear evidence for coronary throm- 20 bosis at 6 p.m. Plaintiff's account of his symptoms after ceasing work on Saturday are that he had a slight touch of pain in the chest as he walked to the tram, a feeling of terrible weakness not amounting to actual pain while in the tram, and a "definite pain" when he had got half-way up the incline leading to his house, which 25 ceased when he reached home. In the history elicited by Dr. Tewsley there was a pain in the chest between 3 p.m. and 4 p.m., and no more pain till plaintiff reached home at 4.30 p.m. when he was seized with a severe pain which lasted five to ten minutes. What appears probable is that in the late afternoon plaintiff's 30 symptoms were becoming ingravescently worse. Dr. Johnson accepts Dr. Wilson's statement that pericardial friction was present when plaintiff was examined in hospital and regards it as indicative of recent coronary thrombosis; but he offers no comment on the atypical features of the case. He insists that angina of effort 35 induces no permanent change in the heart-muscle, and in support of this opinion quotes a letter received from Sir Thomas Lewis in which a similar opinion is expressed. This view has already been sufficiently emphasized.

Dr. McDowell does not think that the pain at 11 a.m. on 40 Saturday was angina of effort, and is not satisfied that the evidence he heard in Court threw much light on the matter. He is undecided as to whether the pain was due to a minor coronary thrombosis

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or to strain of a somatic muscle. I feel sympathy for Dr. McDowell's hesitation. I think his honest doubt shows a better appreciation of the difficulty of the problem than is expressed in some of the dogmatic assertions made. Thought of witnesses appears to be focussed upon the effort made when plaintiff gave his final pull upon the drum. This was a momentary effort. He was standing in an awkward position. He pulled with one hand. He shared the pull with his workmate. He does not himself magnify the effort, but describes it as a "decided heave." The pain appeared as he began to pull, and he at once let go. This is not the kind of effort that usually induces angina pectoris; but just the kind of effort that might strain a somatic muscle. Angina pectoris as a rule is induced by sustained effort. The anginal subject usually knows to a yard how many hundred yards he may walk before the pain appears; and the reason is that the heart must be unduly activated for a certain time before the relative ischaemia, which causes the pain, is induced in the heart-muscle. The momentary effort made by plaintiff was not nearly so likely to provoke an attack of angina pectoris as had he spent some time at stool-straining to discharge a constipated motion. Allowance must be made for preliminary pulling upon the jammed drum before the final effort was made; but no one makes any reference to this. Dr. McDowell, thinking, mistakenly, that plaintiff did his full work on Saturday afternoon, dismisses the morning incident as negligible and attributes plaintiff's permanent incapacity to an attack of coronary thrombosis occurring on Saturday evening when plaintiff reached home. In his view, only coronary thrombosis could explain the abrupt and gross reduction in plaintiff's cardiac capacity; and it would explain also the recurrent attacks of angina. He thinks there may have been subsequent attacks of thrombosis. I agree that cardiac infarction is necessary to an explanation of plaintiff's breakdown; but I am not satisfied that Dr. McDowell is right as to how and when the infarction occurred.

Dr. Tewksley, after summarizing the facts, interprets them as indicating that while plaintiff was doing his work a thrombus began to form and that the subsequent early symptoms were attributable to this; that during the period of rest in bed the thrombus extended, greatly aggravating the symptoms and reducing plaintiff to total incapacity. In my view, this interpretation is probably as near as we can get to a solution of the problem without a *post mortem* examination, which fortunately

is not available. It may be objected that plaintiff was doing heavy work, and this was unfavourable to the formation of a clot. It certainly was extremely heavy work for an untrained lawyer or physician, but not for a technically skilled and practised water-side worker. The ordinary work he did, to which he was habituated, probably did not accelerate his pulse-rate or put any strain whatever upon his circulation; but once an infarct had formed, and it has been shown that it may form painlessly, the case was different. Angina pectoris was now imminent, and the preliminary struggling with the jammed drum plus the final effort induced it. I am inclined to favour thrombosis, beginning in a small vessel, as against infarction by simple narrowing or by occlusion resulting from arterial disease alone, because the symptoms became ingravescient, suggesting gradual extension of the clot along the vessel and increase in the size of the infarct. This seems to me to be the probable explanation; but it is impossible to be certain.

Because the usual onset of coronary occlusion is sudden and severe in character it may be overlooked that at times the occlusion is so gradual as to present only the symptoms of increasing myocardial weakness [20].

This, as Dr. Tewsley suggests, may have been the case here; but it is also conceivable that plaintiff went to work with an infarct already in being as did Harvey—*Harvey v. E. and H. Craig, Ltd.*(4)—who, ignorant of his condition, did three hours' heavy work and then induced angina pectoris by attempting a heavy lift; but I think it unlikely here because it would not explain the ingravescient symptoms.

It should be appreciated that the effects of coronary occlusion are very often anomalous. This must be the experience of every practising physician, and the literature records many examples. One will suffice. Sutton and Lueth (1932) record the case of a man of forty-seven in apparent good health who had an attack of "acute indigestion" that lasted three hours. Thereafter he attended business as usual and felt unusually well. Several times he played golf—on two occasions thirty-six holes a day. Three weeks later he had another attack of severe pain and died suddenly in a day or two. *Post mortem* examination showed a large recent infarct, and an older infarct at the site of which the heart had ruptured.

The present case is essentially atypical, and moreover the evidence contains conflicting statements and conflicting observations, and lacks important information that might have

(4) [1933] N.Z.L.R. s. 102; G.L.R. 605.

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been gained by fuller investigation, which would have helped materially to a more certain diagnosis. There was no medical observation of plaintiff between October 21 and November 4.

There is no adequate account of plaintiff's present condition. Dr. Johnson thinks him fit for light work. Dr. Caughey thinks he is the subject of anxiety neurosis. On this point I can offer no opinion. Dr. Gunson thinks his working-life has been shortened by one year. Dr. Roche would make it two years. I think that his incapacity began when the infarct formed, and that occurred when the time was ripe, irrespective of all external conditions.

Opinion :—

My considered opinion is :—

1. That plaintiff has failed to show that the work he was doing affected in any way the coronary artery disease of which he was the victim.

2. That, irrespective of the work he was doing or of the final effort made, a clot or thrombus formed in a diseased coronary artery and by obstructing the passage of blood to a segment of heart-muscle caused the formation of an infarct.

3. That the balance of probabilities is in favour of this infarct having formed or having begun to form before the final effort was made.

4. That the presence of a cardiac infarct rendered plaintiff liable to attacks of angina pectoris.

5. That plaintiff's attempt to move the jammed drum induced an attack of angina pectoris.

6. That the attack of angina pectoris so induced cannot be called to account in any way for plaintiff's subsequent incapacity.

7. That plaintiff's incapacity is due solely to infarction of the heart which occurred as a natural complication in the course of his arterial disease, irrespective of any external condition.

In accordance with the opinions expressed, the answer to Lord Loreburn's questions(5) is in the negative.

F. FITCHETT, M.D., F.R.C.P.

With the exception of references to *Clinical Heart Disease* (Levien) which was not available, all references to literature made by medical witnesses have been checked and considered. In addition to references specified in the text and listed below, the following books and articles in Medical Journals have been consulted: *Diseases of the Heart*, Cowan and Ritchie, 1935; *Failing Heart of Middle Life*, Hyman and Parsonnet, 1933; *Heart Disease*, Crichton Bramwell, 1932; *Practice of Medicine*, F.W. Price, 1930; *Coronary Artery Disease*, Howard B. Sprague, *Nelson Living Medicine*; *Angina*

- Pectoris*, Paul White, *Nelson Living Medicine; Recent Advances in Cardiology*, East and Bain, 1931; *Arterio-Sclerosis*, Coudry, 1933; *Facts on the Heart*, Cabot, 1926; *Angina Pectoris*, James MacKenzie, 1923; *Heart and Athletics*, Deutch and Kauf, 1927; *Clinical Electrocardiograms*, F. A. Willius, 1930; *Preliminary Pain in Coronary Thrombosis*, Harold Feil, *Amer. Jour. Med. Sc.*, Vol. 193, 1937; *Mild Forms of Coronary Thrombosis*, Robert Levy, *Ach. M. Med.*, Vol. 47, 1931; *Prognosis Following Recovery from Coronary Thrombosis*, J. H. Palmer, *Quart. Jour. Med.*, 1937; *Vascularization and Haemorrhage of the Intima of Arteriosclerotic Coronary Arteries*, J. C. Paterson, 10 *Arch. Path.*, Vol. 22 (No. 3), Sep., 1936; *The History of Angina Pectoris*, Sir Humphrey Rolleston, *Glasg. Med. Jour.*, 1937; *Angina Pectoris and Coronary Thrombosis*, E. T. Freeman, *Irish Jour. Med. Sc.*, 1936; *The Fourth or Apical Lead in Coronary Thrombosis*, E. T. Freeman, *Lancet*, Feb., 1937; *The Four-Lead Electrocardiogram in Coronary Disease*, A. Wilcox, 15 *Lancet*, Feb., 1937; and various articles on, or references to, angina pectoris and coronary thrombosis in current medical journals.

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[2] Paul Dudley White.—*Heart Disease*. 1937, 586.
20 [3] Paul Dudley White.—*Heart Disease*. 1937, 589.
[4] Thomas Lewis.—*Clinical Science*. 1934, 118 et seq.
[5] Paul Dudley White.—*Heart Disease*. 1937, 590.
[6] Samuel Levine.—*Coronary Thrombosis*. 1931, 25.
[7] Paul Dudley White.—*Heart Disease*. 1937, 353.
25 [8] T. R. Harrison.—*Failure of the Circulation*. 1935, 328.
[9] Paul Dudley White.—*Heart Disease*. 1937, 345.
[10] Paul Dudley White.—*Heart Disease*. 1937, 353, 354.
[11] Samuel Levine.—*Coronary Thrombosis*. 1931, 8.
[12] Samuel Levine.—*Coronary Thrombosis*. 1931, 10.
30 [13] Samuel Levine.—*Coronary Thrombosis*. 1931, 25.
[14] Samuel Levine.—*Coronary Thrombosis*. 1931, 22.
[15] Samuel Levine.—*Coronary Thrombosis*. 1931, 22.
[16] Samuel Levine.—*Coronary Thrombosis*. 1931, 70, 71.
[17] Paul Dudley White.—*Heart Disease*. 1937, 358.
35 [18] Brahdry and Kahn.—*Trauma and Disease*. 1937, 48.
[19] Master et al. *Journal*, Mount Sinai Hospital.—*Relation of Various Factors to the Onset of Coronary Thrombosis*. Jan.-Feb., 1937, 224.
[20] Sutton and Lueth.—*Diseases of the Coronary Arteries*. 1932, 58.

The Court, in view of the finding of the medical referee, must
40 hold that the plaintiff was not injured by accident arising out of and in the course of his employment. Accordingly, there must be judgment for the defendant, to whom leave is reserved to apply for costs.

Judgment for the Defendant.

Solicitors for the plaintiff: *Sullivan and Winter* (Auckland).

Solicitors for the defendant: *Buddle, Richmond, and Buddle* (Auckland).

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[IN THE COURT OF ARBITRATION.]

GIRVIN v. BAY OF ISLANDS COUNTY.

1937.
October 13.
1938.

April 13.

O'REGAN, J.

Workers' Compensation—Delay in giving Notice of Accident—Whether "Reasonable cause" for such Delay—Workers' Compensation Act, 1922, s. 26 (1) (2).

On January 27, while plaintiff, a labourer, was employed by defendants cutting gorse with a slasher, portion of the brush came into contact with his left eye and caused injury. The eye felt as though there were a hair in it and was slightly bloodshot; but it did not really worry plaintiff until about March 15 or 16, when it grew painful. On March 20 plaintiff consulted Dr. F. Plaintiff did not give notice of the accident until March 23, after he had paid a second visit to Dr. F., who advised him to see a specialist. He consulted Dr. P., who found the condition hopeless. Eventually plaintiff lost the sight of the eye; but, if the eye had been treated in time, the sight would have been preserved. Hence the defendants contended that they were prejudiced in their defences by plaintiff's delay in giving notice.

Held, on the facts, 1. That the initial injury and infection were mild, and that the severe pain about mid-March marked the development of the ulcer that caused the loss of the eye.

2. That, as there was honest belief that no claim for compensation would arise until the development of pain led the plaintiff to consult Dr. F., there was "reasonable cause" for the omission to give notice until March 23.

Ellis v. Fairfield Shipbuilding and Engineering Co., Ltd.(1); *Zillwood v. Winch*(2); *Albison v. Newroyd Mill, Ltd.*(3); *Fenton v. S.S. "Kelvin" (Owners)*(4); *Forrest v. Proprietors Taratu Coal-mines*(5); and *Templeton v. E. J. Coupe and Sons, Ltd.*(6), applied.

Webster v. Cohen Bros.(7) and *Bedford v. Bell and Winney, Ltd.*(8) distinguished.

Wassell v. James Russell and Sons, Ltd.(9), referred to.

(1) [1913] S.C. (Ct. of Sess.) 217; 6 B.W.C.C. 308.

(2) (1914) 7 B.W.C.C. 60.

(3) (1925) 95 L.J.K.B. 667; 18 B.W.C.C. 474.

(4) [1925] 2 K.B. 473; 18 B.W.C.C. 328.

(5) [1928] G.L.R. 155.

(6) (1932) 146 L.T. 518; 25 B.W.C.C. 56.

(7) (1913) 108 L.T. 197; 6 B.W.C.C. 92.

(8) (1933) 26 B.W.C.C. 161.

(9) (1915) 84 L.J.K.B. 1606; 8 B.W.C.C. 230.

CLAIM FOR COMPENSATION under the Workers' Compensation Act, 1922, for loss of the sight of plaintiff's left eye.

WORKERS' COMPENSATION ACT, 1922, s. 26.—(1) An action for the recovery of compensation shall not be maintainable by a worker unless notice of the accident has been given as soon as practicable after the happening thereof.

(2) The want of or any defect or inaccuracy in any such notice shall

not be a bar to the action if the Court is of opinion that the employer has not been prejudiced in his defence or otherwise by the want, defect, or inaccuracy, or that the want, defect, or inaccuracy was occasioned by mistake, or by absence from New Zealand, or by any other reasonable cause.

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Plaintiff, aged sixty, a labourer, had been employed by the defendant county on road maintenance for seven or eight years, and he stated that during an afternoon late in January, 1937—he thought about the 27th—he met with an accident while working on the Towai-Kawakawa main highway. He was cutting gorse with a slasher on the road-side, and, while so engaged, portion of the brush came into contact with the eye and caused injury. In recounting what happened he told the Court that he felt a pricking sensation in the eye, slight pain for a few minutes, that the eye watered, but that in a little time he resumed his work and continued for the remainder of the day, feeling the while as though there was “a hair on the eyeball.” He was working alone, but about a half-mile away were two other men at work, and all three walked home together. Plaintiff stated that he related what had occurred, and that they each, at his request, looked into the eye, but could see nothing in it. Thereafter, plaintiff continued his work from day to day, losing no time, and apparently attaching no importance to the eye-condition inasmuch as he felt no pain, “but felt now and then that there was a hair in it.” He said, further, that he looked at the eye in the glass, “perhaps a couple of times a week,” and that there was nothing in its appearance to make him apprehensive, though the eye was “slightly bloodshot.” One of the men who examined the eye on the evening of the accident, Charles Hallard Allen, another road-man employed by the defendants, gave evidence, and he stated, *inter alia*, that he recollected plaintiff relating what had occurred, and asking him to look into his eye; that he did so, but “could see nothing wrong, except that it was bloodshot.” Allen added “I noticed the eye several times after that on other days, and it “was still bloodshot.” Plaintiff himself said that the eye did not really trouble him until about March 15 or 16, when it grew painful, and on the 20th—Allen stated, on his advice—plaintiff consulted Dr. Frengley, Superintendent of the Kawakawa Hospital, on whose advice ultimately he went to Auckland to consult Dr. Pittar, who found the condition hopeless. On March 23, he notified the county clerk of the accident.

Trimmer, for the plaintiff.

Hore, for the defendant.

Cour. adv. vult.

The judgment of the Court was delivered by

O'REGAN, J. Three defences are raised: (a) That the accident did not occur; (b) that, if it did occur, notice thereof was not given

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as soon as practicable, in consequence whereof the defendants are prejudiced in their defence or otherwise ; and (c) that the action was not commenced within the period of six months prescribed by s. 27 of the statute.

The first and third defences may be taken together. Though plaintiff was unable to give the exact date, he was certain that the accident occurred towards the end of January, and Allen was equally emphatic that it was during the last week of that month. During cross-examination it was suggested to Allen that the accident occurred about January 18 or 19, but he was positive that the date he gave in his evidence-in-chief was correct. The writ was issued on July 14, 1937, and thus was well within the six months' limit. That the accident had occurred in the manner described by plaintiff was not challenged at the hearing, and, accordingly, the first and third defences fail.

All the medical witnesses agree that, had the eye been treated in time, the sight would have been preserved, and hence it follows that the defendants have been prejudiced in their defence. Plaintiff stated at the hearing that he called on the county clerk immediately after he had seen Dr. Frengley on Saturday, March 20, and notified him verbally of the accident. His accuracy in that connection was challenged, and, by direction of the Court, the evidence of the county clerk was taken some weeks later. We are satisfied that on the Saturday plaintiff called on the local chemist and had Dr. Frengley's prescription made up, but that he did not notify the county clerk until Tuesday, March 23, after he had paid a second visit to Dr. Frengley. Girvin himself states that on the day of the accident, after a short cessation, he went on with his work for the remainder of the day, and that thereafter he continued his daily labour, as usual, until he consulted Dr. Frengley on Saturday, March 20. He states :

Continued my work, as usual ; lost no time. Eye felt nothing out of the way—no pain—but felt now and then that there was a hair in it. Eye did not really trouble me until March 15 or 16. Began to get painful. Saw Dr. Frengley . . . on the 20th . . . Gave me a prescription and directed me to return in a couple of days. Went to chemist and got ointment . . . Reported to Dr. Frengley on March 23. He advised me to see a specialist at Auckland without delay.

Under cross-examination the plaintiff added :

The eye was not particularly painful on March 15. No pain at all previously . . . Cannot say if the eye was bloodshot all the time. I suppose it was bloodshot most of the time. Nobody looked in my eye more than once . . . Knew that what had happened—whatever it was—had occurred while I was at work. Never thought of compensation until the pain started, which made me call on the doctor.

Under re-examination plaintiff continued :

Looked at the eye in the glass occasionally—perhaps a couple of times a week. Nothing in its appearance to make me think it was in a serious condition. Eye was slightly bloodshot. . . . If I told doctors I had trouble with the eye, I meant a feeling of irritation like a hair on the eyeball. . . . Never anything wrong with the eye before.

The witness, Allen, says in the same connection :

Recollect one day in January, 1937, when Girvin asked me to examine his eye. It was in the last week of the month. Went home on several evenings with plaintiff. On the particular evening we met, he asked me at once to look into his eye. Looked and could see nothing wrong, except that the eye was bloodshot. Noticed the eye several times after that on other days—still bloodshot. He told me that he was cutting gorse, and that a piece of the bush had flicked the eye. He told me that on the first evening when I looked into the eye. Happened during the afternoon, he said.

Under cross-examination the witness continued :

Eye never appeared to get worse until a day or two before Girvin saw Dr. Frengley. Never complained of pain. . . . I suggested then that he should see the doctor. Have no recollection of telling anyone that he had complained of pain all along. Girvin never complained to me of any pain until a day or two before he saw the doctor. I recognize my signature to the document you produce. These are the answers I gave the county clerk. Did not mean that the eye was getting worse over the period. As the eye was bloodshot, I probably thought it was painful. Girvin never said there was any pain. At times it was a little more bloodshot than at others.

In the course of his cross-examination Allen was confronted with a typewritten document comprising a series of twelve questions. These had been prepared by the county clerk, who motored to the spot where Allen was at work as a roadman, and there confronted him with the series of interrogatories already typed, one of which was, "Did the eye appear to get worse on subsequent occasions?" In answer, Allen wrote the words, "Gradually got worse." In the witness-box he insisted that he did not mean to imply that the plaintiff had complained of pain before mid-March or that the eye had been getting uniformly worse over the period, and he added that the county clerk had called on him unexpectedly, and that until his arrival he (the witness) had no idea that he was to be called upon to answer any questions in connection with the case. It is no more than justice to Allen to say that we consider that there is no inconsistency whatever between the answers he gave the county clerk under the circumstances described and the statements—necessarily more detailed—which he made later in Court. Each written answer is necessarily terse and is equivalent to the first answer a witness should give in Court, but he cannot and should not be expected to give qualifying and explanatory details until and unless he is actually testifying as a witness in Court.

Of the three professional witnesses all agree (a) that the condition might have been caused by such an accident as plaintiff describes ; (b) that it was not possible to say whether the eyeball

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was punctured at the time of the accident or merely scratched, but that it was probably the latter; (c) that no foreign body was seen in the eye; (d) that the interval between the date of the accident and the complaint of severe pain probably indicated the development of the ulcer; and (e) that the interval was exceptionally long. The material portion of Dr. Frengley's evidence is:—

On March 20, 1937, Samuel Girvin consulted me. He complained of trouble in his left eye. Examination revealed a corneal ulcer with secondary iritis. I told him that I took a serious view of the condition, that I would give him the proper treatment, and that if it did not improve within two days he must, whether he liked it or not, go to a specialist in Auckland. . . . He reported one or two days later. The condition of the eye was worse, and I sent him immediately to Dr. Pittar, eye specialist of Auckland.

Under cross-examination the doctor added:

Girvin said he had had considerable pain for a day or two before he saw me, and that it had not given him serious trouble up till then. A corneal wound, if clean and uninfected, heals quickly in a day or two. If infected, it may take some time to involve the iris. It is possible that the condition of Girvin's eye . . . was consistent with an injury happening at the end of January, 1937. I cannot say that he was unaware of the injury of the eye until two or three days before he saw me. He told me that he had trouble more or less all the time, but that nothing had seriously worried him. Girvin is an honest man, well-thought of in the district, and I do not think that he is the type of man who would consult his doctor for every little thing . . .

Dr. Pittar states that, when plaintiff consulted him on March 25 he stated that the eye-condition did not worry him very much until about a week earlier, when the eye had become painful. The doctor added that the severity of an eye-injury cannot be inferred from the degree of pain, and that a loose foreign body under the eyelid, though not nearly so serious, would cause much more pain than a scratch injury to the cornea. He was satisfied that, if infection supervened shortly after the injury, it must have been mild, but that from the rapid degeneration between the time plaintiff consulted Dr. Frengley and his arrival in Auckland he was satisfied that the infection had recently become severe. Dr. Pittar stated further that a condition of irritation and bloodshot might be a trivial condition, and though he would have expected the pain before mid-March, it was quite reasonable to believe that there was little pain until the severe infection had developed. Amplifying his evidence, the doctor said that there might be very slow progress, even after ulceration, and that ulceration was usually associated with pain; that there might be a considerable interval between the injury and the ulceration, and that it was his opinion that the hypopean ulcer commenced about the time plaintiff complained of the pain.

Dr. Fairclough, the only witness called for the defence, was really in substantial agreement with Dr. Pittar. He examined

plaintiff for the defendants on April 29, when the eye was certainly a total loss. At the time, owing to the long interval between the date of the alleged injury and the condition of total blindness, he concluded that there must have been an intervening injury, but he became satisfied later that such was not the fact. Dr. Fairclough thinks that the accident caused an abrasion of the cornea which was followed by a mild infection, and that that condition continued until a few days before plaintiff saw Dr. Frengley when a more serious infection had supervened. He agrees that the hypopean is a serious type of ulcer, and that it probably did not commence until mid-March. The doctor adds that he was so impressed by the length of time between the date of the accident and the serious development that he pressed plaintiff with questions, who admitted that from the outset there had been pain and discomfort.

Section 26 (2) of the Workers' Compensation Act, 1922, provides that :

The want of or any defect or inaccuracy in any such notice shall not be a bar to the action if the Court is of opinion that the employer has not been prejudiced in his defence or otherwise by the want, defect, or inaccuracy, or that the want, defect, or inaccuracy was occasioned by mistake, or by absence from New Zealand, or by any other reasonable cause.

The meaning of the subsection is that, even though an employer has been prejudiced by the failure to give notice, that failure shall not be a bar to an action for recovery of compensation if the Court is of opinion that it was occasioned by a mistake or other reasonable cause. The point is well illustrated by the judgment of this Court (per *Frazer, J.*) in *Heath v. Waihi Gold-mining Co., Ltd.*(1). Accordingly, the one question in the present case is whether there was reasonable cause for Girvin's delay in giving notice of the accident as a result of which he has lost the vision of his left eye.

Mr. *Hore* has referred the Court to several cases in support of his submission that plaintiff had no reasonable cause for the delay in giving notice. The earliest of these is *Webster v. Cohen Bros.*(2). In that case a shopwalker fell from a ladder, and in the result he suffered a twisted knee which caused severe and continuous pain. "I continued my work as best I could in pain, but had to keep resting," he said. "I continued to work for two months, expecting every day it would be better. I was always in very great pain . . . My knee gave me great pain all the time. It frequently gave way under me." Though the accident occurred on April 3, 1912, and plaintiff continued in great pain until June 1,

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(1) [1935-36] N.Z.L.G.R. 45.

(2) (1913) 108 L.T. 197; 6 B.W.C.C. 92.

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when he became totally disabled, the County Court Judge found, notwithstanding that the employers were prejudiced, that there was reasonable cause for the delay in giving notice of the accident inasmuch that plaintiff had continued to work and had reasonably believed he would recover. The Court of Appeal held otherwise, however, and the following excerpt from the judgment of *Cozens Hardy*, M.R., explains the reason: "The learned County Court Judge has, I think, assigned as a reasonable cause one which cannot be considered as satisfactory. He was not dealing with a case where the injury from accident is latent and not at first apparent, or with a case where the accident is apparently so trivial that it would be absurd to expect a workman to give notice at first. He was dealing here with an accident which was serious from the very first day and there was severe pain daily from the first" (3).

An obvious commentary on *Cohen's* case is that it is now twenty-five years old, and so should be considered in the light of many more recent cases on the same point, which are equally authoritative and which explain more fully the principles on which reasonable cause is founded.

In *Wassell v. James Russell and Sons, Ltd.* (4), a socketmaker was engaged on a Wednesday in bending a hot piece of iron which slipped and burnt his finger. He showed the injury to several fellow-workers, of whom one was his son, who bound it with a piece of cloth. Later in the day the injured man's wife applied boracic acid and bound the injured part again. On the following day he worked, apparently without pain, and at night his wife bound the finger as before. He worked again the following day, but the next day, Saturday, his finger had become so painful that he could not hold a hammer, and he had to cease work at 10 a.m. and go home. On the Monday following he gave notice to the employers, who told him to see his doctor. The doctor found that he was suffering from septic poisoning and sent him to hospital, where the finger was amputated. On a claim for compensation, the doctor said that the poisoning had occurred some time before the date of amputation, probably a day or two. The County Court Judge found that notice had not been given as soon as practicable, but that there had been no unreasonable delay until the day the man ceased work, after which he found that there was no excuse for delay. The Court of Appeal refused to reverse the decision, holding that there was evidence to support the finding and no misdirection. A perusal of the case shows that, though the accident

(3) (1913) 108 L.T. 197, 199; 6 (4) (1915) 84 L.J.K.B. 1606; B.W.C.C. 92, 96. 8 B.W.C.C. 230.

was trivial at first, it became serious on the Saturday when plaintiff had to cease work, and that the evidence of his own doctor showed that the employers had been prejudiced by reason of failure to give notice then. It was practicable to give notice on the day of the
 5 accident, but delay would have been excused until Saturday, when the injury had become painful and disabling.

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Next, we have been referred to the case of *Bedford v. Bell and Winney, Ltd.*(5). There a worker was unloading timber from the hold of a ship on Saturday, November 7, 1931, when he was struck
 10 on the head by a swinging baulk of timber. He was "knocked out" for ten minutes, after which he climbed by a ladder to the deck, where he rested for three-quarters of an hour before resuming work. He finished on that day, but complained of pain at home and was unwell on the Sunday. On the Monday he applied
 15 for work and worked for various employers until January 27, 1932, when he collapsed and died while at work. No notice was given of the accident until February 20, though he had continually complained of pain in the head. The County Court Judge found that notice had not been given as soon as practicable, that the
 20 employers were thereby prejudiced in their defence, and that there was no reasonable cause for the delay; and, on appeal, that view was sustained. Obviously, the facts were extraordinary in that, although the widow knew of the accident shortly after it occurred, no notice was given until nearly a month after the death, and the
 25 following passage from the judgment of *Slessor, L.J.*, speaks for itself: "I think it is a case which falls directly within the case of "*Webster v. Cohen*(6), which has been so often cited. The most
 "that can be said here is that the workman having these headaches
 "as the result of the accident, which were serious but which he
 30 "though might alter for the better, is not sufficient reason for
 "not giving notice. There is the evidence of the wife that he
 "had had terrible headaches. There is the evidence of his mates,
 "who all agree that he was quite well and a healthy man before
 "the accident, but that he complained of pain on November 7.
 35 "Mr. Gibbs said he always complained of pain in his head. Mr.
 "Newbon said he complained of his head, that his hand was
 "automatically going up to his head. All that makes it impossible
 "for the learned Judge to say that it can be inferred that the
 "man thought the pain was trivial"(7).

40 The point involved has frequently been considered and there are necessarily many reported cases. In *Ellis v. Fairfield Ship-building and Engineering Co., Ltd.*(8), the plaintiff alleged that

(5) (1933) 26 B.W.C.C. 161. (7) (1933) 26 B.W.C.C. 161, 178.

(6) (1913) 108 L.T. 197; 6 B.W.C.C. (8) [1913] S.C. (Ct. of Sess.) 217.

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he was injured by accident on June 1, 1911. From that date to August 5 following he continued at work, though he suffered pain in the neck and shoulder, which he attributed to the alleged accident. Then he consulted a doctor, who diagnosed muscular rheumatism. On November 11 he left his employment, and thereafter up to December 3 he was treated for severe neck-strain. On that date he consulted another doctor, who informed him that his head was partially dislocated from the cervical vertebrae, and advised that his condition was dangerous, and had him placed in an infirmary. On January 30, 1912, he gave notice of the accident and claimed compensation. The employers denied liability on the ground that notice had not been given as soon as practicable after the alleged accident, that the claim was out of time, and that, by reason of the delay, they were prejudiced in their defence. The Sheriff-Substitute found for the employers, but agreed to state a case for the Court of Session, and that tribunal found that there was reasonable cause for the delay and remitted the case back to the Sheriff-Substitute. There it is obvious that delay would have been excused up to December 3 owing to the conflicting and erroneous medical advice. On that date, however, the condition was correctly diagnosed and plaintiff was fully aware of the danger of his condition. Nevertheless, the claim for compensation succeeded, and the following excerpt from the judgment of the Lord President epitomizes the Court's view: "He does not think it is anything very serious, he does not make a claim, and he goes on in that state of ignorance until nearly the end of December, when he gets much worse, and then he goes to another doctor, who makes, I suppose, a more careful examination and finds out that he has sustained a very serious injury. I agree that after that the man might have given notice, but then, as I think was said by one of the learned Judges in this Division, 'We are not to measure this question of notice in very nice scales'; and I think the trouble occasioned to this man by his removal to the infirmary and his being laid up there are all reasonable causes for a little longer delay in giving of the notice. I therefore think that there is only one conclusion to be reached upon these facts—viz., that there was here a reasonable cause for the man 'not giving notice of the accident' (9).

Another apposite case would appear to be *Zillwood v. Winch* (10). A bricklayer was ruptured on October 17, 1913, while lifting an unusually heavy basket of cement. He felt a

(9) [1913] S.C. (Ct. of Sess) 217, 224; (10) (1914) 7 B.W.C.C. 60.
6 B.W.C.C. 308, 318.

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pain, but thought he had merely "ricked" himself, and in a few minutes proceeded with his work. On reaching home he noticed a lump about the size of a small marble in the place where he had felt the pain, but did not realize that he had been ruptured, and

5 he went on working for three months. Then he began to experience pain, and he consulted a doctor, who advised him to wear a truss. He replied that he could not work with a truss, and gave notice of the accident and claimed compensation. The case was defended on the ground that notice was not given as

10 soon as practicable after the happening of the accident, that the employer was prejudiced, and that there was no reasonable cause for the delay. The County Court Judge held that there was reasonable cause, and the Court of Appeal upheld the finding, though the employer had been prejudiced. *Cozens Hardy*, M.R.,

15 who delivered the judgment of the Court of Appeal, attached great importance to the fact that the injured man had not been disabled from working and had continued for three months. Again, in *Albison v. Newroyd Mill, Ltd.*(11), a girl of fifteen met with an accident on January 22, 1925, whereby she suffered injury

20 to her nose, causing it to bleed. Her immediate superior washed the wound, and the girl went on with her work. Her nose swelled, and sometimes poultices were applied by her mother. She was obliged to cease work on March 12, when she consulted a doctor, who found the wound septic. She recovered under treatment

25 and was able to resume her employment on March 30. On her claiming compensation, liability having been denied on the ground of failure to give notice as soon as practicable and that the employers had been prejudiced in their defence, the County Court Judge, without deciding on what date notice should have been

30 given, held that there was no reasonable cause for the delay. The Court of Appeal, however, held that the County Court Judge had misdirected himself, and remitted the case for a new trial. The Court laid it down that, in order to be given as soon as practicable, notice must be given when the claimant realizes that his condition

35 entitles him to compensation, and *Atkin*, L.J., quoted with approval(12) the following passage from the judgment of *Warrington*, L.J., in *Fenton v. S.S. "Kelvin" (Owners)* (13):

"In my opinion, the learned County Court Judge was right in law

"in holding that the important question in such a case as the

40 "present is: At what time did the workman realize that he had

"suffered an injury by accident entitling him to compensation

(11) (1925) 95 L.J.K.B. 667; 18 B.W.C.C. 474. (13) [1925] 2 K.B. 473; 18 B.W.C.C. 328.

(12) *Ibid.*, 672; 485.

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"under the Act? The Judge has not quite put it in these terms.
"He has put it rather: At what time did he realize what I have
"already referred to, the inter-connection of cause and effect?
"But it comes to the same thing, At what time did he realize
"that he had suffered that which entitled him to compensation 5
"for injury by accident?" (14).

The present case is similar in many respects to that of
Forrest v. Proprietors Taratu Coal-mines(15). There the plaintiff,
a coal-miner, was struck in the right eye by a fragment of coal
in the course of his employment in April, 1926. On his way out 10
of the mine after ceasing work he mentioned the accident to the
underviewer, but neither took it seriously. The eye became
inflamed, however, and so remained for a few days, though the
inconvenience did not prevent the plaintiff from continuing his
work. When the inflammation had subsided there remained a 15
slight dimness of vision, which was continuous, but the plaintiff
continued at work. Early in 1927 he began to experience severe
headaches, and in May of that year he saw a specialist, who advised
that these were due to the condition of the eye in which there had
ceased to be useful vision. A few days later plaintiff interviewed 20
the mine-manager, telling him of the accident and that he had
already mentioned it to the underviewer. The underviewer had
left the employment of the defendants, but the manager undertook
to locate him, if possible. Hearing nothing further from the mine-
manager, plaintiff gave formal notice of the accident on June 18 25
and claimed compensation. The writ was not issued until
November 10, but the Court excused delay owing to
defendants' undertaking to locate the underviewer. At the hearing
it was established that the condition was hopeless from the outset,
and hence the Court found that the employers were not prejudiced, 30
as they have been here, by the delay in giving notice. The point
which bears particularly on the present case, however, was that
the Court found that there was reasonable cause for the delay
notwithstanding the continued dimness of sight. A perusal of
the report shows that the Court was largely influenced by the 35
evidence of Dr. Hall, an eye specialist, who stated that it was a
common occurrence for ophthalmic specialists to be consulted by
patients suffering from grave defects of vision of long standing,
who had no conception of the serious impairment of their vision.
The Court was influenced further by the fact that the plaintiff 40
had continued his work as a miner without interruption, and was

(14) [1925] 2 K.B. 473, 486; 18 (15) [1928] G.L.R. 155.
B.W.C.C. 328, 339.

satisfied that it was reasonable under the circumstances for him to give no notice of the accident until Dr. Hall had advised him of the serious condition of the eye. The delay in commencing the action was excused on the same ground. In this country, the law differs from that obtaining in England in that a claim is of no legal consequence; but it is the commencing of the action that matters. Here, however, the action was commenced within the prescribed period.

The case of *Templeton v. E. and J. Coupe and Sons, Ltd.* (16), has many points also in common with that before us. The plaintiff met with an accident on February 20, 1931, as a result of which his left eye was injured by a fragment of stone. He gave notice of the accident to the employers three days later, but did not consider the injury serious. The eye continued to trouble him, but he carried on with his work until May, when he was discharged owing to slackness of work. On August 20 he realized that the condition of the eye was serious, and he made a claim for compensation on the 29th. The employers denied liability on the ground that the claim was out of time and that there was no reasonable cause for the delay. The County Court Judge, despite what he described as the flagrant inconsistencies in the plaintiff's evidence, was of opinion that he was an entirely honest witness in his averment that he did not realize the serious nature of the condition until August 20, and he found that the delay in making the claim was due to reasonable cause. The Court of Appeal upheld the decision, and both Lords *Hanworth*, M.R., and *Romer*, L.J. (17), quote with approval the following passage from the judgment of Lord *Dunedin* in *Ellis v. Fairfield Shipbuilding and Engineering Co., Ltd.* (18): "A man may have an accident and honestly believe at the time that nothing serious has happened to him, and, therefore, not conceiving that he has a good claim against his employer, make no claim; but if it afterwards turns out that he has made a mistake in fact, and really has been injured, that may be . . . reasonable cause for his not making the claim within the six months" (19).

Honest belief, then, is an essential ingredient of reasonable cause. It is clear that in this case there was honest belief that no claim for compensation would arise, until the development of pain led the plaintiff to consult Dr. Frengley. Not only the plaintiff's evidence, but that of the professional witnesses, justifies the inference that the initial injury and infection were mild and

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(16) (1932) 146 L.T. 518; 25 (18) [1913] S.C. (Ct. of Sess.) 217;
B.W.C.C. 56. 6 B.W.C.C. 308.
(17) *Ibid.*, 521; 63, 65. (19) *Ibid.*, 223; 317.

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that the severe pain of which the plaintiff complained about mid-March marks the development of the hypopean ulcer. "It is
"only when the workman realizes the connection between his
"condition and the accident that in cases such as this the necessity
"for giving notice of injury arises at all, because it is not until 5
"he realizes that, that it becomes practicable to give notice":
per Warrington, L.J., in *Fenton v. S.S. "Kelvin" (Owners)* (20).
"We must distinguish between two different sets of facts," said
Buckley, L.J., in Webster v. Cohen Bros.(21): "In the one the
"workman says, 'If things continue as they are, I shall never 10
"require to give notice of any claim for compensation'; that
"might be reasonable cause for not giving notice. The other
"state of facts he says, 'I have had an accident, which is serious,
"but I expect it will alter for the better, and if, as I hope, it does
"alter for the better, I shall never make a claim for compensation 15
"at all, and, therefore, I will not give notice of the accident.'
"That is not a reasonable cause for not giving notice of
"the accident"(22). In our opinion, it is clear that this case falls
within the first category. Consideration of the reported cases
shows conclusively that, in the matter of notice, it is against the 20
policy of the statute to encourage men to make claims for compensation in respect of every knock or scratch inseparable from daily life. Nor are men, particularly labouring men, expected to realize the potentialities of occurrences in themselves trivial and which in fact are not called accidental injuries at all until their 25
consequences turn out to be serious. Here there was no acute and continuous pain from the date of accident until the date of notice as in *Webster v. Cohen Bros.*, or *Bedford v. Bell and Winney, Ltd.*(23). Further, had Girvin in fact notified the county clerk immediately after seeing Dr. Frengley on Saturday, March 20, 30
the letter notifying the defendants' insurers admittedly could not have left Kawakawa until 9.20 a.m. on Monday, March 22, and most probably would not have been perused by the addressee until the following day, when plaintiff kept his appointment with Dr. Frengley. On that day he notified the county clerk; he left 35
for Auckland next day, and was seen by Dr. Pittar on the 25th. Accordingly, the Court, by a majority, finds that there was reasonable cause for the omission to give notice until March 23, and hence plaintiff's claim succeeds.

The period of liability in a case like this commences to run, 40
not from the date of the accident, but from the date of disable-

(20) [1925] 2 K.B. 473, 488; 18 (22) *Ibid.*, 199; 97.

B.W.C.C. 328, 341.

(21) (1913) 108 L.T. 197; 6 B.W.C.C. (23) (1933) 26 B.W.C.C. 161

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ment—in this case, March 20, 1937 : *Scott v. Harraway and Sons, Ltd.* (24). Plaintiff's average weekly earnings were £4 4s., and hence the rate of weekly compensation as for total disablement is £2 16s. He was in hospital six weeks and five days, 5 and attended during two weeks as an out-patient, and hence we think it reasonable to allow compensation for nine weeks' total disablement. Fifty-five weeks have elapsed since plaintiff saw Dr. Frengley on March 20, up to which date he had earned wages. Plaintiff is entitled to a weekly payment of £1 8s. for the loss of 10 the eye, and, accordingly, he is entitled to £409 7s. compensation, and medical expenses £1, particulars of which are as follows : Nine weeks' total disablement at £2 16s. per week, £25 4s. ; forty-six accrued weekly payments of £1 8s., £64 8s. ; two hundred and fifty-eight weekly payments of £1 8s., commuted at 5 per cent. 15 compound interest, £319 15s. ; medical expenses, £1 ; total, £410 7s. We allow £10 10s. costs, and £2 2s. for one medical witness. The plaintiff and one other lay witness are entitled to their expenses pursuant to the scale prescribed for the Magistrates' Court, and these will be settled by the Clerk of Awards. Judg- 20 ment accordingly.

A dissenting opinion was given by Mr. Prime, the employer's nominated member of the Court.

Judgment for the plaintiff.

Solicitors for the plaintiff : *Connell, Trimmer, and Lamb* (Whangarei).

Solicitors for the defendant : *Buddle, Richmond, and Buddle* (Auckland).

(24) [1927] G.L.R. 18.

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[IN THE SUPREME COURT AND IN THE COURT OF APPEAL.]

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WELLINGTON CITY CORPO-
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PLAINTIFF

APPELLANT

AND

GOVERNMENT INSURANCE
COMMISSIONER - -
DEFENDANT.

RESPONDENT

*Land Transfer—Mortgage—Mortgagee's Sale—Mortgagee's Estimate of Value—
Whether same must be stated at the reasonable Value of the Land—Land
Transfer Act, 1915, s. 110 (1).*

The sum to be stated by a mortgagee in his application to the Registrar of the Supreme Court under s. 110 of the Land Transfer Act, 1915, as the value at which he estimates the land to be sold under his power of sale, is such sum as the mortgagee thinks fit; in other words, it is a matter for the discretion of the mortgagee.

So held by the Court of Appeal, affirming the order of *Myers, C.J.*, p. 175, *post*.

Loyal Marlborough Lodge v. Rogers(1) and *Public Trustee v. Wallace*(2) considered.

Dicta of *Smith, J.*, in *Cleave's Buildings, Ltd. v. Porter*(3) considered and explained.

(1) (1909) 29 N.Z.L.R. 141; 12 G.L.R. 271.

(2) [1932] N.Z.L.R. 625; G.L.R. 254.

(3) [1932] N.Z.L.R. 423, 425; G.L.R. 325.

ORIGINATING SUMMONS for determination of certain questions arising out of the intended sale by the Government Insurance Commissioner on behalf of the Crown as mortgagee of certain land in the City of Wellington. He applied to the Registrar of the Supreme Court at Wellington to conduct a sale of the land under the provisions of the Land Transfer Act, 1915. The Commissioner in his application to the Registrar stated that he estimated the value of the land at £12,000.

The facts, as agreed upon, were that by memorandum of mortgage London Markets (Wellington), Ltd., mortgaged to His Majesty the King (which term was expressed to include the Government Insurance Commissioner for the time being holding office under the Government Life Insurance Act, 1908) the land described in the said memorandum of mortgage; and after the release of a certain portion of such land the balance of the land comprised in the mortgage was, and is, the land described in the

schedule hereto. Default having been made under the mortgage and the company's application for relief having been dismissed, the Government Insurance Commissioner on November 5, 1937, made application to the Registrar of the Supreme Court
5 at Wellington to conduct a sale of the said land under the provisions of the Land Transfer Act, 1915.

Apart from certain special rates due to the plaintiff Corporation the moneys secured by the mortgage were a first charge upon the land. The sum of approximately £1,450 was due to the plaintiff
10 Corporation for rates in respect of the land and that sum constituted a second charge thereon.

In his application to the Registrar the Government Insurance Commissioner stated that he estimated the value of the land at £12,000, which sum was less than the total amount of the moneys
15 hereinbefore referred to, and was, in the opinion of the plaintiff Corporation, a sum less than the reasonable value of the land.

The plaintiff Corporation contended that the sum to be stated by the mortgagee under the provisions of s. 110 of the Land Transfer Act, 1915, as the value at which he estimated the land
20 to be sold must be a sum equal to the reasonable value of the land.

The defendant contended (a) that such sum might be any sum that the mortgagee thought fit; and (b) that the result of a sale by auction under the provisions of the Act was conclusive as to the value of the land.

25 *O'Shea and J. R. Marshall*, for the plaintiff.

Harding, for the defendant.

Cur. adv. vult.

MYERS, C.J. Apart from certain special rates due to the plaintiff Corporation, the moneys secured by the mortgage to
30 the Crown are a first charge upon the land. There is then a sum of approximately £1,450 due to the plaintiff Corporation for general rates in respect of the land, and that sum constitutes a second charge.

The plaintiff Corporation is professedly of opinion that the
35 sum of £12,000 at which the Commissioner estimates the value is less than the reasonable value of the land, and contends that the mortgagee is required by the statute to estimate the land at its reasonable value. The Commissioner, on the other hand, contends that the amount of the estimate may be any sum that
40 the mortgagee thinks fit. What I am asked to do is to decide which of these contentions is right.

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Section 110 (1) of the Act requires that a mortgagee when making application to a Registrar to conduct a sale "in such application shall state the value at which he estimates the land to be sold." The history of the legislation on this point is well known: it has been stated by the Court of Appeal in *Loyal Marlborough Lodge v. Rogers*(1) and, again, in *Public Trustee v. Wallace*(2). 5

If the intention of the Legislature was that the mortgagee should be under control in regard to his estimated value of the property proposed to be sold, it would seem passing strange that that intention was not expressed. Certainly it has not been expressed; and it was held in *Public Trustee v. Wallace*, as it had previously been held in the decision that led to the law being changed—*Hamilton v. Bank of New Zealand*(3)—that the Registrar has neither the duty nor the power to fix a reserve price. 15

Mr. O'Shea contends that there are a number of dicta by various Judges to the effect that the section requires a fair and reasonable estimate to be made. The only dictum, however, to that effect, so far as I am aware, is that of *Smith, J.*, in *Cleave's Buildings, Ltd. v. Porter*(4), where His Honour said: "The duty of the mortgagee is to act in good faith and to make a reasonable estimate of the saleable value of the land to be sold"(5). I do not gather, however, from the judgment that the learned Judge was expressing a considered interpretation of s. 110. 20

In the *Loyal Marlborough Lodge* case(6), *Williams, A.C.J.*, certainly said that the object of the new provisions was to prevent an oppressive exercise of a power of sale by the mortgagee(7); and *Denniston, J.*, said that the object was to secure that the mortgagee in buying the land should pay a fair value(8). To the dicta of the other members of the Court I shall refer presently; but be it said at this point that both *Williams, A.C.J.*, and *Denniston, J.*, were referring to the new statutory provisions as a whole, and that neither of them even purported to interpret specifically the requirement that the mortgagee in his application to the Registrar "shall state the value at which he estimates the land." In any event what *Smith, J.*, said was *obiter*. In the case before him the mortgagor complained that the estimate of value fixed by the mortgagee was such as could not have been 35

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| (1) (1909) 29 N.Z.L.R. 141; 12 G.L.R. 271. | (5) <i>Ibid.</i> , 425; 325. |
| (2) [1932] N.Z.L.R. 625; G.L.R. 254. | (6) (1909) 29 N.Z.L.R. 141; 12 G.L.R. 271. |
| (3) (1904) 24 N.Z.L.R. 109. | (7) <i>Ibid.</i> , 143; 273. |
| (4) [1932] N.Z.L.R. 423; G.L.R. 325. | (8) <i>Ibid.</i> , 144, 145, 147, 149, 273-74, 275, 276. |

- honestly fixed, and he proceeded under the "Extraordinary
 "Remedies" rules by motion and statement of claim to restrain
 the mortgagee from proceeding further with the intended sale.
 The learned Judge held that that was not an appropriate procedure
 5 in the circumstances for investigating an allegation of dishonesty.
 That was sufficient to dispose of the matter then before the Court,
 but His Honour went further and said that on the evidence sub-
 mitted he was of opinion that it was impossible to hold that the
 mortgagee had acted in a way that was unreasonable or dishonest.
 10 It may be that the conduct of a mortgagee in applying to the
 Registrar to conduct a sale might in respect of the statement as
 to the estimated value be so dishonest or oppressive as to entitle
 the mortgagor to redress by injunction or otherwise in appropriate
 proceedings, but I should prefer to reserve my own opinion on the
 15 point until the actual case arises and one has had the advantage
 of hearing argument upon it.

I do not doubt that what the Legislature had in mind was as
 far as reasonably possible to ensure that a mortgagee purchasing
 land sold by him through the Registrar should acquire it at a fair
 20 and reasonable value. But it seems to me to have left the estimate
 of value for the purposes of the sale to the mortgagee's own
 discretion.

- In *Loyal Marlborough Lodge v. Rogers*(9) *Edwards, J.*, said :
 "In theory, from the beginning of the system under which
 25 "a mortgagee was allowed to purchase at a sale conducted through
 "the Registrar at his instance, the sale was conducted in such a
 "manner as to produce a fair price for the land. In practice it
 "was found that the result was not so. A mortgagee who sells
 "through the Registrar in nine cases out of ten does so, and in
 30 "all cases presumably does so, because he does not hope to realize
 "sufficient to satisfy his security by a sale at auction on his own
 "instructions. The result was this: that persons who would
 "gladly have been purchasers at a reasonable price were
 "completely in the dark as to the amount that would have to be
 35 "paid in order to overpass the sum necessary for the mortgagee
 "to pay to protect his security. And the immediate consequence
 "was, as all those who have practised in New Zealand know
 "perfectly well, that persons who would gladly have become
 "purchasers at a reasonable price by auction stayed away from the
 40 "sale, and subsequently dealt with the mortgagee. That practice
 "led to very great hardships to mortgagors, as was pointed out
 "in *Hamilton v. Bank of New Zealand* (24 N.Z.L.R. 109). . . .

(9) (1909) 29 N.Z.L.R. 141; 12 G.L.R. 271.

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"It appears to me that the draftsman of this statute had the case of *Hamilton v. Bank of New Zealand* before him, and has made a very reasonable provision for the protection alike of the mortgagor, the mortgagee, and the revenue. . . . I omitted to say, in pointing out that the system devised was both intelligible and intelligent, that the *great protection which the mortgagor now has is that all persons disposed to consider the purchase of the property can ascertain to what amount it is reasonably probable that they will have to go to acquire it*"(10). (The italics are mine.)

Cooper, J., said: "The manner in which the Legislature has met the possible and in many cases the actual existence of oppression caused by the exercise of the mortgagee's right to purchase seems to me very clear. If the mortgagee wishes to acquire the equity of redemption of the mortgaged property he can sell through the Registrar now as previously, but he has to make an estimate of the value of the land. He may become a bidder at the sale, and if there is no other person who purchases the land he may become the purchaser. A conveyance to him is to be made not in consideration of the amount of his highest bid, but in consideration at least of the amount at which he has estimated the value of the property. And the purchase-money which an ordinary purchaser would have to pay, but which the mortgagee does not have to pay, is provided to be at least the amount of the estimate. That is the scheme of the statute"(11).

Chapman, J., was more definite. He said: "What it [the Legislature] has done is to introduce a whole and complete system eminently fair to both parties. . . . The Legislature allows the mortgagee to put his own value on the land, and if he makes it above the actual value he must credit the balance to the mortgagor, as it must be presumed that he had some reason for so estimating the value"(12).

In *Public Trustee v. Wallace*(13), after referring to the scheme which now appears in s. 110 and the following sections of the Land Transfer Act, 1915, and stating that it was intended for the benefit and protection of the mortgagor and also of the mortgagee, I myself said: "Though the point does not arise here, provided a mortgagee has in fact become entitled to exercise the power of sale contained or implied in his mortgage and the jurisdiction of the Registrar, on the mortgagee's application to him, is thereby brought into existence and a sale is thereafter conducted

(10) (1909) 29 N.Z.L.R. 141, 144-46; (12) *Ibid.*, 149; 276.

12 G.L.R. 271, 273-74.

(11) *Ibid.*, 147; 275.

(13) [1932] N.Z.L.R. 625; G.L.R. 254.

"in accordance with the provisions of s. 110 and the following sections of the Land Transfer Act, I do not at present see how, in the absence of something in the nature of fraud or collusion, the mortgagor could have any cause of action against the mortgagee by reason, or in consequence, of the sale"(14).

Blair, J., in the same case, said: "The practical effect of the 1905 amendment, which, having been re-enacted in the Consolidation Act, is still law, is that a mortgagee, when offering a property through the Registrar, when considering the estimated value he will supply to the Registrar, has to remember that the mortgagor may, subject as to the payment of certain costs, redeem the property at whatever figure the mortgagee selects for his estimate, and if the mortgagee fixes too low an estimate he runs the risk that the mortgagor may find the money to redeem the property at the estimate. Moreover, the statute provides that if the mortgagee buys in the property at the Registrar's sale the consideration stated in the transfer or conveyance is not to be less than the value estimated by the mortgagee (s. 112 (3)). These provisions ensure a considerable measure of protection to the mortgagor, and would entirely prevent the recurrence of what happened in *Hamilton's* case, of the mortgagee buying at the Registrar's sale of property stated to be worth £50,000 at £5,000"(15). Again he said: "Had it [the Legislature] considered it proper to have clothed Registrars with power to fix reserves such a power would have been conferred, and appropriate machinery provided to enable Registrars to invoke independent expert assistance by valuers to enable them to perform this duty. The Legislature, instead of doing this, introduced legislation in the year following *Hamilton's* case, designed to compel the mortgagee himself to fix a figure which indicated his value of the property. To ensure fairness to the mortgagor, the right was conferred upon him of obtaining a transfer of the property at the value so estimated by the mortgagee. This legislation had the ingenious effect of compelling the mortgagee to fix as his estimate a value which meant that the mortgagor, or his friends or relatives through him, could acquire the property, thus preventing the mischief which occurred in *Hamilton's* case, but avoiding the unfairness to the mortgagee pointed out by *Edwards, J.*, when he showed that if the Registrar fixed too high a reserve it would deprive the mortgagee of any possibility of taking advantage of the provisions of the statute"(16).

(14) *Ibid.*, 635; 258.

(15) *Ibid.*, 642; 262.

(16) *Ibid.*, 644-45; 263.

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In my view, what the Legislature has done is to leave the estimate of value for the purposes of the sale to the discretion of the mortgagee; and it seems to me that that is not only intelligible and intelligent, but is perfectly just. On the other hand, to place the mortgagee under control in the fixation of the estimate—at all events where there is no suggestion that he is not acting in good faith—might well be unjust to him and involve him in increased loss. There is every incentive to the mortgagee to fix as his estimate of the value a fair and reasonable sum. If he fixes it too high and he finds that he has to buy in at the sale, he has to give credit to the mortgagor for more than the land may be worth. If, on the other hand, he fixes it at too low a sum, then he runs the risk pointed out by *Blair, J.* The probable result in either case would be to increase his own loss. That would be so in any case where there are no other interests involved than those of the mortgagor and the mortgagee. In the case where there are mortgages or charges subsequent to the first mortgage a subsequent incumbrancer would not object (as the plaintiff here does) to the estimate being lower than his own idea of the value because it would give him the better opportunity of protecting himself at the sale. The position is then that from the point of view of both the mortgagor and of subsequent incumbrancers there would seem to be nothing unjust or unfair in leaving the estimate of value under s. 110 to the mortgagee's own discretion. The plaintiff's grievance here, if any, arises from the circumstances, (a) that the Crown is the mortgagee; and (b) that a municipal Corporation has not the same power to protect itself at a sale as a private person or an ordinary commercial corporation would have.

I do not propose to answer the questions in the summons categorically. I prefer to answer them by repeating what I have already said—namely, that the value to be estimated under s. 110 is a matter for the discretion of the mortgagee. Whether or not in any special circumstances indicating bad faith, dishonesty, or oppression the Court may interfere, I prefer, for my part, to leave open until the question expressly arises for determination.

Order accordingly.

From the above order, the plaintiff Corporation appealed.

In the Court of Appeal,

O'Shea, for the appellant. The natural meaning and implication of the word "estimate" in s. 110 (1) of the

Land Transfer Act, 1915, is the amount at which the mortgagee really values the land. The duty of the mortgagee is to act in good faith, and make a reasonable estimate of the land to be sold : *Cleave's Buildings, Ltd. v. Porter*(1). This is the fair, reasonable, and natural meaning of the statutory provision, while the judgment appealed from uses s. 111 to limit the application of s. 110.

The history of the legislation is given in *Hamilton v. Bank of New Zealand*(2), where the property was sold at a gross under-value. The amendment of the statute followed that judgment, and this was discussed in the later judgments. Sections 78-82 of the Property Law Act, 1905, correspond with ss. 110-112 of the Property Law Act, 1915. The object of s. 110 is to ensure that the mortgagee should sell at a fair value : *Loyal Marlborough Lodge v. Rogers*(3) and *Public Trustee v. Wallace*(4).

The section should be construed literally : see *Maxwell on the Interpretation of Statutes*, 8th Ed. 2-4 ; the observations of *Myers, C.J.*, in *Wellington City Corporation v. Kinsman*(5) ; and the Acts Interpretation Act, 1924, s. 5 (j).

Appellant's interpretation of the section : (a) protects the mortgagor in respect of his pecuniary liability ; (b) protects the revenue in respect of stamp duty ; and (c) protects the mortgagee, such as a local authority.

J. R. Marshall, in support. The word "estimate" means "to assign a value to, to appraise, or to assess," "to value or appreciate the worth of," thus indicating that the estimate must be an attempt to find out what the land is worth : *Garrow's Law of Real Property*, 3rd Ed. 479, which is accepted by the legal profession as a guide to what the law is. The facts in *Hamilton v. Bank of New Zealand*(6) could still happen, if appellant's contentions were not accepted, and unless the mortgagee can be compelled to place a fair estimate on the land to be sold. *Hamilton's* case may be compared with the *Loyal Marlborough Lodge* case(7), heard by the same Judge, after the evil shown in the former case had been remedied by the amending legislation.

Harding, for the respondent. The judgment appealed from could have gone further, and said that the mortgagee has

- (1) [1932] N.Z.L.R. 423, 425 ; (4) [1932] N.Z.L.R. 625, 634 ; G.L.R. 325. G.L.R. 254, 258, 259, 261, 265.
 (2) (1904) 24 N.Z.L.R. 109, 115, 116, 132-33 ; 7 G.L.R. 277, 284, 288-89, 290, 293. (5) [1937-38] N.Z.L.G.R. 78.
 (3) (1909) 29 N.Z.L.R. 141, 144, 146-47 ; 12 G.L.R. 271, 273, 274-75. (6) (1904) 24 N.Z.L.R. 109 ; 7 G.L.R. 277.
 (7) (1909) 29 N.Z.L.R. 141 ; 12 G.L.R. 271.

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an absolute unfettered discretion to make an estimate, which is arbitrary and without any reference to value. The usual method of estimation is the amount owing to the mortgagee, except where it is patent that the amount owing cannot be recovered.

Apart from the statute, a mortgagee is entitled to sell under value, so long as he takes reasonable precautions to obtain a proper price: *Farrer v. Farrers Ltd.*(8) and *Davey v. Darrant*(9). The Court will not be diligent to find a higher duty on a mortgagee when he is selling through the Registrar than when he is not. The intention of the statute is to decrease the possibility of sales through the Registrar at an undervalue, and to provide precautions to secure a proper price.

The purpose of the legislation is to be gathered from the language of s. 110 (1) of the Land Transfer Act, 1915, "the value at which he estimates the land to be sold." The motive of the Legislature is immaterial. The dicta cited by the appellants from *Hamilton v. Bank of New Zealand* and the *Marlborough Lodge* cases are *obiter* in regard to the question now before the Court.

Foreclosure was abolished by s. 41 of the Conveyancing Ordinance, 1842, and that, being found inconvenient, the Legislature amended the original Ordinance by ss. 6-10 of the Conveyancing Ordinance Amendment Act, 1860, to enable the mortgagee to bid at a sale conducted by the Registrar: *Re Benjamin and Jacobs*(10). *Hamilton's* case(11) exposed the weakness of the then existing system, and showed that it lay principally in the fact that possible purchasers were disinclined to bid at mortgagee's auctions as they had no means of knowing what they were likely to have to pay in competition with the mortgagee, with the effect that no reasonable chance was given for the best price to be obtained. The Property Law Act, 1905, as re-enacted in 1908, was commented on in the *Loyal Marlborough Lodge* case(12), where the dicta tend to show the effect, and therefore the object, of the new statute. In 1915 the statute was re-enacted without alteration. Judicial notice of the general practice was taken in *Hamilton's* case by *Stout*, C.J., and *Edwards*, J.(13), and by *Blair*, J., in *Wallace's* case(14). The principle of *stare decisis* should be applied.

(8) (1888) 40 Ch.D. 395.
(9) (1857) 26 L.J. Ch. 830.

(10) (1890) 9 N.Z.L.R. 152.

(11) (1904) 24 N.Z.L.R. 109; 7 G.L.R. 277.

(12) (1909) 29 N.Z.L.R. 141, 145, 146, 147; 12 G.L.R. 271, 274, 275.

(13) (1904) 24 N.Z.L.R. 838-39.

(14) [1932] N.Z.L.R. 625, 635, 644; G.L.R. 254, 263.

A sale at auction properly conducted is conclusive of the market value at the time : *Shelly v. Nash*(15), which is applicable to the sale of the fee-simple.

Possible exceptions to non-interference with the mortgagee's discretion are dishonesty, bad faith, and oppression, as indicated by the learned Chief Justice in the Court below(16); but his observation thereon is not necessary to the judgment.

Then the mortgagee must estimate his value at the amount of redemption under s. 112, but he is not obliged to fix the exact value. He may fix any price he likes, and he would (though not under a duty so to do) fix the upset price at which he would sell the property.

The present case comes within the exception where literal construction would lead to manifest injustice : *Maxwell on the Interpretation of Statutes*, 8th Ed. 4, 10. The only literal construction could be to state "the value of the land at the time of the estimate." As to the question of the revenue : see s. 78 of the Stamp Duties Act, 1923.

O'Shea, in reply. The statute creates a duty on the mortgagee, and excludes a discretion on his part : see *Garrow's Law of Real Property*, 3rd Ed. 188, and the Code of Civil Procedure, R. 314. The mortgagee is bound by his value of the mortgagor's estate and interest in the land : *Simpson v. Schwass*(17).

Cur. adv. vult.

The judgment of the Court was delivered by

BLAIR, J. This appeal raises questions as to the duty of a mortgagee when selling the mortgaged property through the Registrar in exercise of the power of sale. The question came before the Supreme Court upon an agreed statement of facts. The appellant is interested in the amount to be realized at the mortgagee's sale because there is owing to it a very substantial sum for rates. The financial interest of the mortgagee in the property is limited to the amount of the principal and interest due on the mortgage, together with the costs of sale and an additional sum sufficient to cover special rates.

The appellant claims that the mortgagee's application to the Registrar to conduct the sale under s. 110 of the Land Transfer Act, 1915, should "state the value at which he [the mortgagee]

(15) (1818) 3 Madd. 232, 236; 56 (17) [1931] N.Z.L.R. 673, 677; E.R. 494, 496. G.L.R. 162, 164.

(16) *Ante*, p. 180, l. 33.

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estimates the land to be sold " at a reasonable sum. The respondent, on the other hand, contends that the value to be stated is left to the discretion of the mortgagee, and this view was upheld by the learned Chief Justice in the Court below(1).

Section 110 was originally enacted as s. 78 of the Property Law Act, 1905. That was over thirty years ago, and this case and *Cleave's Buildings, Ltd. v. Porter*(2), so far as is known, are the only cases in which any question as to the extent of the duties of mortgagees in estimating value has been raised.

It is convenient to look at s. 110 together with the immediate following sections for the purpose of ascertaining their meaning in the light of the law as it was immediately before the 1905 amendment. Before 1905 a mortgagee was free to buy in at a sale through the Registrar at any price—even a mere nominal one—if his bid was the highest made at the sale. No subsequent encumbrancer nor any interested stranger had any means of ascertaining what the mortgagee was prepared to let the property go for. This militated against competition, and it frequently happened that the mortgagee bought in at a mere nominal figure, thus leaving the mortgagor still liable under his personal covenant for the main part of the mortgage debt. The revenue also suffered because, when a sale was at a nominal figure, the stamp duty was nominal also. It was to mitigate these evils that the 1905 amendment was passed. Let us now examine the amended statute.

A mortgagee is required to "*state the value at which he estimates the land to be sold.*" Be it noted that the section does not require him to state the *value* of the land. All that is required is his *estimate* of the value. An estimate is essentially different from a valuation, because the former never pretends to be more than an approximation based may be on imperfect or incomplete data. The estimate required is that of the mortgagee himself, and not that of valuers or other experts. The Legislature knew that the person who is required to make the estimate is the seller, and it is not unreasonable to assume that what he is required to do is to give the figure at which he is prepared to sell his security. That this is the case is made plain by looking at s. 111, which upon payment to the mortgagee of the value of the land as estimated together with the then expense of the sale and together also with the amount of any moneys expended by the mortgagee subsequent to the time when the mortgagee made his estimate gives to the

(1) *Ante*, p. 180, l. 1 *et seq.*

(2) [1932] N.Z.L.R. 423; G.L.R. 325.

mortgagor the right of obtaining a discharge of the mortgage. The mortgagee knows of the existence of this right in the mortgagor, and, if the mortgagee estimates the value of the land to be sold at a sum less than the principal and interest and costs, he, the mortgagee, runs the risk of being called upon to part with the whole of his security for less than the amount secured.

It is plain, therefore, that ss. 110 and 111 go far to ensure that the mortgagee will not without good reason touching the value of his security risk estimating a lesser sum than the amount of the mortgage debt and costs.

If there be cast upon the mortgagee the duty to estimate a reasonable sum as contended for by the appellant, no machinery is provided to enable the Registrar to check the reasonableness of the estimate. If the Legislature had in any wise intended that anything more than a mere estimate was required, a more apt word than "estimate" would have been used. Everybody interested in the sale can now ascertain the mortgagee's estimate.

Moreover, upon a sale the mortgagee if he becomes the purchaser is not permitted to insert in the transfer as the consideration for the sale any less sum than his estimate. As has been demonstrated by the practice of conveyancers ever since the passing of the 1905 Act, most, if not all, of the mischief apparent in the old practice has been cured by the amendment as so interpreted.

It seems to us, therefore, that looking at the Act itself it is not possible to read into it an implication of any duty upon the mortgagee in making his estimate to do more than state his estimate. Any conveyancer knows that it has been a common practice ever since the passing of the original provision now embodied in s. 110 and subsequent sections, for the mortgagee to estimate his security at the figure which will return him principal and interest owing on the mortgage plus costs of sale.

It is clear from the remarks of Judges in *Loyal Marlborough Lodge v. Rogers*(3) and *Public Trustee v. Wallace*(4) that the change in the law effected by s. 110 and subsequent sections was due to the desire of the Legislature to mitigate the mischief pointed out in *Hamilton v. Bank of New Zealand*(5). That case was decided in the year 1904. The bank had advanced some £68,000, and held securities on land and livestock which on a valuation made for it about a year or so before the Registrar's sale amounted to £80,000. Another financial institution had two days prior

(3) (1909) 29 N.Z.L.R. 141; 12 G.L.R. 271. (5) (1904) 24 N.Z.L.R. 109; 7 G.L.R. 277.

(4) [1932] N.Z.L.R. 625; G.L.R. 254.

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to the mortgagee's sale offered to lend £40,000 to the mortgagor on the bank's security, and it was proposed to the bank that it should agree to accept the £40,000 thus raised and take a second mortgage for the balance of its indebtedness. The bank was agreeable to do this, provided the rate of interest on the new advance of £40,000 did not exceed £6 10s. per cent. The proposed lender refused to lend at less than £7 per cent. The negotiations thus fell through, and the sale proceeded. At the sale the lands were knocked down to the mortgagee at £5,000 and the bank purchased the whole stock at 12s. per head (which price was a shade more than their real value). The stock realized £20,700, making a total realization by the mortgagee bank of £25,700, which was £14,300 less than the bank could have obtained in ready money if the £40,000 loan proposal had been acceded to. The Government value of the lands was £61,168.

In his judgment, concurred in by other members of the Court, *Edwards, J.*, discussed whether there was any intention of the Legislature to require the Registrar to fix reserves, and he concluded there was no such intention(6). If, as is admitted to be the case, the alteration of the law made by what is now s. 110 was intended to cure the mischief indicated by *Hamilton's* case, the necessity for elaborate machinery if the Registrar was to be clothed with a power to fix reserves was made plain by the learned Judge, and the injustice to mortgagees in being so placed in the hands of the Registrar was also pointed out. These considerations apply equally to the contention that a "reasonable" sum must be fixed in the mortgagee's estimate. As the law then stood, the only protection to mortgagors at sales through the Registrar was the fact that there was a public auction on conditions of sale settled by the Registrar. It was also pointed out that the reason why mortgagees bought at a low figure was to save stamp duty. The learned Judge also said that possible purchasers did not know how much the mortgagee would bid, and this militated against adequate prices being obtained at mortgagee's sales. Pointed reference was made to the necessity for an alteration in the law upon these heads.

Mr. *O'Shea* complains that in this present case the mortgagee's estimate is £12,000, which is less than the Government value £15,200. He stresses the fact that the proviso to s. 111 does not give any protection to the mortgagor for any balance of the mortgage debt over and above the estimate, and leaves the

(6) (1904) 24 N.Z.L.R. 109, 137; 7 G.L.R. 277, 291.

mortgagor's personal covenant untouched. As to this contention the remarks of *Edwards, J.*, in *Hamilton's* case are in point. He said: "In the course of a somewhat long professional practice I have never known an instance of the recovery of any part of
 5 "the balance of the mortgage-money from the mortgagor after a
 "Registrar's sale. No doubt there have been instances in which
 "the mortgagor has been compelled to take advantage of the
 "Bankruptcy Act in order to free himself from liability. This
 "is, of course, no small hardship if the property acquired by the
 10 "mortgagee at the Registrar's sale at all approaches in value the
 "amount lent on it. . . ." (7).

The amendment to the law goes far to cure that particular injustice to the mortgagor in that it compels the mortgagee to fix such an estimate as makes him run the risk of the mortgagor, by
 15 himself or with the help of some of his friends, redeeming the property at the estimated price. If the mortgagee buys in, he must give credit to the mortgagor for not less than the estimate. It is highly probable in the present case that the mortgagee's estimate—£12,000—represents the mortgage debt plus costs, and
 20 it is only £3,200 less than the Government value. If the law were the same as when *Hamilton's* case was decided, the mortgagee could have bought the property in at the sale at considerably less than the amount of the mortgage debt and costs. The hardship to mortgagors on this head has thus been in great
 25 measure mitigated.

Smith, J.'s, remarks in *Cleave's Buildings, Ltd. v. Porter* (8), were much relied on. In that case an injunction was sought to restrain the sale through the Registrar of a mortgaged property on the ground that the mortgagee had fixed such a low estimate
 30 of value that he had acted in an unreasonable and dishonest manner. Relief was refused, first, upon the ground that the matter could not be dealt with by means of injunction proceedings, and, secondly, upon the merits as well. When discussing the merits he said that it was impossible to hold that the mortgagee
 35 had been in anywise unreasonable or dishonest. He also said: "The duty of the mortgagee is to act in good faith and to make
 "a reasonable estimate of the saleable land to be sold" (9).

It may be said that, if fraud on the part of the mortgagee were established, the Court would grant relief, and on this phase of the
 40 case we desire to make the same reservation as to fraud as was made by the learned Chief Justice in the Court below, but it will

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(7) *Ibid.*, 141; 294.

(8) [1932] N.Z.L.R. 423, 425;
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(9) *Ibid.*, 425; 325.

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be obvious that if *Smith, J.*, in *Cleave's* case(10) intended to lay down as a definite rule that the mortgagee must make a reasonable estimate, he would not have concluded his judgment by stating in effect that the mortgagor must establish fraud before the Court could grant him relief in the case of a too low estimate. The judgment in *Cleave's* case was an oral one, and there is much to be said for the doctrine that the precise words of an oral judgment should not without good reason be treated as having a meaning far beyond the particular point then under discussion. When the words quoted from *Smith, J.'s*, judgment are read in their whole context, we take them to mean that the unreasonableness of the estimate he speaks of must be an estimate tainted with fraud. We cannot read them as intended to countenance the reopening of all mortgagees' sales merely upon the ground that the estimate may be, according to the view of land valuers, too low.

Loyal Marlborough Lodge v. Rogers(11) was relied upon because of certain expressions in the judgments relating to the intention of the Legislature in enacting what is now s. 110. *Denniston, J.*, said : "The object of it is to secure that the mortgagee in buying "the land should pay a fair value"(12). But that learned Judge was dealing with a claim by a mortgagee that he could purchase at less than his estimate, and the Judge also said : "The minimum consideration to be stated is to be the value at which "the mortgagee himself has assessed the land, and by doing which "he may have prevented other persons from entering into "competition with him for its purchase. . . . If a mortgagee "chooses to sell through the Registrar and take advantage to buy "in, there is no reason why he should not pay the full amount "of his estimated value. . . ."(13).

There is nothing in *Public Trustee v. Wallace*(14) to lend support to the contention that in estimating the value of the land there was cast on the mortgagee a duty to fix what has been called a reasonable value. All that concerns the mortgagee is to realize enough to pay his principal, interest, and costs, and the fact that he estimates the value at the aggregate of these figures could not in anywise be suggested as not complying with the statute. Indeed, if he fixes his estimate of the value of the land at less than the above aggregate, this indicates that he is prepared to let his security go at less, and we can find nothing in the statute to say

(10) *Ante*, p. 176, l. 20.

(13) *Ibid.*, 144; 273.

(11) (1909) 29 N.Z.L.R. 141; 12 G.L.R. 271.

(14) [1932] N.Z.L.R. 625; G.L.R. 254.

(12) *Ibid.*, 143; 273.

that the mortgagee may not do so. The point was overlooked by the appellants that the lower the estimate the easier it is for the mortgagor to redeem. We read the statute as meaning an estimate of the value of the property to the mortgagee himself.

- 5 We think that the intention of the Legislature was to provide an ingenious device to render difficult, if not impossible, the mischief disclosed in *Hamilton's* case, which mischief was that a mortgagee was able to acquire the mortgaged property at a trifling figure quite unrelated to the actual value of the property
- 10 to the mortgagee. Before the passing of this legislation it was by no means uncommon for properties to be bought in by the mortgagee at nominal values; but this practice, since 1905, has ceased, and the most usual figure at which the mortgagee buys is the amount of the principal, interest, and costs.
- 15 In our view, the sum to be stated as the value at which the mortgagee estimates the land to be sold is such sum as the mortgagee thinks fit.

Appeal dismissed.

Solicitor for the appellant: *John O'Shea* (Wellington).

Solicitors for the respondent: *Meek, Kirk, Harding, and Phillips* (Wellington).

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29 ;
April 29.

MYERS, C.J.
CALLAN, J.
NORTH-
CROFT, J.

[IN THE COURT OF APPEAL.]

AUCKLAND CITY CORPORATION v. MAX PAYKEL BUILDING, LIMITED.

Rating—Rateable Property and Exemptions—Whether Local Authority entitled to recover from Owner Rates in respect of Land from which Occupier exempt—“Due by an occupier”—Rating Act, 1925, s. 70—Municipal Corporations Act, 1933, s. 392 (1).

Except where the owner is expressly made liable for rates made by a local authority, and, speaking generally, this is only where he is also the occupier or is deemed by the statute to be the occupier, that local authority's only right to recover from the owner arises under s. 70 of the Rating Act, 1925, and exists only where there are rates due by an occupier.

Therefore, a municipal Corporation is not entitled to recover against the owner of a building rates in respect of that portion leased by him to and occupied by the Crown, from which the Crown as occupier is exempt.

The King and Harris v. Dunedin City Corporation(1), approved.

(1) [1936-37] N.Z.L.G.R. 219.

QUESTION OF LAW arising in an action for recovery of rates, and, by consent, removed into the Court of Appeal for argument and determination.

The facts, as agreed upon, were as follows :

The plaintiff, a body corporate under the provisions of the Municipal Corporations Act, 1933, was the rating authority for the City of Auckland ; and the defendant, a company incorporated under the provisions of the Companies Act, 1933, having its registered office at Auckland, was the owner of fee-simple of land with a building thereon situated at Anzac Avenue within that city. 5

RATING ACT, 1925, s. 70.—(1) Any rate or part thereof due by an occupier may also, at the option of the local authority or of any person authorized to collect rates as aforesaid, be recovered from the owner, or from any person owning any interest, including an interest as first mortgagee, in the rateable property in respect of which such rate is payable, or from any person actually in occupation of the premises in respect of which such rate is payable.

(2) If an owner or any such person as aforesaid pays any rate due by an occupier, then, unless such owner or other person has agreed with the

occupier to pay the rates, the amount of rates so paid shall be deemed to be a debt due and owing from and after the time of paying the same by the occupier to the owner or other person paying the same.

(3) Where a mortgagee is compelled to pay any rates under this section in respect of any rateable property under mortgage to him, the amount of such rates so paid by him shall, as from the date of paying the same, be deemed to form part of the principal moneys secured by the mortgage, and shall be chargeable with interest accordingly ; though at the option of the mortgagee the same shall be recover-

The seventh floor or part thereof of the said building was leased by the defendant to His Majesty the King for a term of more than six months certain, and was occupied by a Government Department (the Department of Agriculture), and such
 5 Department was entered in the valuation roll and the rate-book of the plaintiff Corporation as the occupier of such premises; and the defendant was entered thereon as the owner.

The plaintiff Corporation struck rates for the period, June 1, 1936, to May 31, 1937, in respect of the seventh floor of the said
 10 building, which rates amounted in all to £42 3s. 4d.

A demand for the rates so struck was made in accordance with the requirements of the statutory enactments relating thereto on the defendant company, and the statutory period within which the defendant company was required (if at all) to pay such rates
 15 had elapsed.

There had been paid to the plaintiff Corporation the sum of £16 19s. 2d., portion of the said rates levied on the said premises (being the amount of special rates thereon, as distinguished from general rates); but the defendant company refused to pay to the
 20 plaintiff the sum of £25 4s. 2d., being the balance of the rates demanded.

On December 10, 1937, *Callan, J.*, by consent, ordered the following question of law arising in the action to be argued and removed into the Court of Appeal for adjudication, namely:—

25 “Whether the defendant company as the owner of the land “and that portion of the building thereon in respect of which the “plaintiff claims general rates is exempt from payment thereof by “reason of the occupation of such portion of the said building by “the said Department of Agriculture?”

30 *Stanton*, for the plaintiff.

Cornish, K.C., and *V. R. S. Meredith*, for the Crown.

able by him either from the mortgage or the occupier immediately after payment thereof by the mortgagee.

(4) Where any person other than the owner has been compelled to pay any rates under this section, then, unless such person has agreed with the owner to pay the same, or has already recovered such rates from the occupier, the amount so paid shall be deemed to be a debt due and owing from and after the time of paying the same by the owner to such person, and any such payment by an owner under this provision shall be deemed to be a payment by

him under subsection two of this section.

(5) No rates shall be recoverable from any tenant of rateable property, not being an occupier within the meaning of this Act, to a greater extent than the rent payable or to be payable by him for such property at the time of making the demand for the same upon him, and any such rate so paid by him may be deducted from his rent.

(6) Nothing herein shall be construed to affect any contract now or hereafter made between any persons as to the liability for the payment of rates as between the

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Stanton, for the plaintiff. This case resembles *Auckland City Corporation v. St. John's College Trust Board*(1), in which the defendant, who claimed an exemption, opened. The onus is upon the defendant.

Solicitor-General, Cornish, K.C., for the defendant. The 5
Crown is entered as "occupier" in the rate-book.

A. The Crown is exempt from payment of general rates in respect of property that it occupies: *Public Trustee v. Waipawa County and the Attorney-General*(2); *Southland Boys' and Girls' High Schools Board v. Invercargill City Corporation*(3). 10

B. The Crown is the "occupier" of the material portions of the property in question: *The King and Harris v. Dunedin City Corporation*(4).

C. There is therefore no debt due by the "occupier" of the premises. 15

D. It follows that no action can be brought again the "owner" of the premises under s. 70 of the Rating Act, 1925: The rates must be rates "primarily due by the occupier": *The King and Harris v. Dunedin City Corporation*; and see *Ryde on Rating*, 5th Ed. 109-11. The occupier here is the Crown. 20

Stanton, for the plaintiff. A. The property in question is "rateable property" within the meaning of s. 2 of the Rating Act, 1925, in which "owner" and "occupier" are also defined. The defendant is entitled to receive the rack rent; and, consequently, is the occupier. Where the valuation roll was made up and when 25
the rates were struck, the Crown was the lessee, and so the occupier. This property is not excluded from the definition of "rateable property," but is included within it.

(1) [1935-36] N.Z.L.G.R. 143.

(2) [1921] N.Z.L.R. 1104; G.L.R. 643.

(3) [1931] N.Z.L.R. 881; G.L.R. 487.

(4) [1936-37] N.Z.L.G.R. 219.

parties to such contract; and in any case where, as between themselves, the owner has contracted to pay the rates, the occupier or any tenant of the rateable property may pay the same if the owner has not paid them, and deduct the same from any rent payable by him to the owner.

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s. 392 (1).—Except as otherwise specifically provided herein, nothing in this Act or in any regulations or by-laws under this Act shall be construed to apply to or shall in any way affect the interest of His Majesty in any property of any kind belonging to or vested in His Majesty.

[To MYERS, C.J.] "Lands" in para. (a) of the definition means the fee-simple.

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In England the occupier is rated, but that does not imply that the Crown is exempt here where the property is rated; *Ryde on Rating*, 5th Ed. 1, 7. This is the root of one error in *Harris's* case. General rates may be levied on all "rateable property," as defined: Municipal Corporations Act, 1933, ss. 77 and 99.

B. On the striking of the rate, the property becomes subject to a charge for the amount of the rate, and, on the date fixed for payment of the rate, this amount becomes a debt due both by owner and occupier to the local authority, although no demand has been made. In New Zealand it is the land that is rateable, whether it is vested in the Crown or in a private person: *Waitomo County v. Miles*(5); and see *Northcote Borough v. Buchanan*(6) and *The King v. Mayor, &c., of Inglewood*(7).

[To MYERS, C.J.] The rates on a block of flats are recoverable from the occupier of each flat; and, failing payment, the owner is liable, as the owner and the occupier are both liable. The Rating Act, 1925, assumes that every property has an owner and an occupier.

In practice, no demand is made on the owner in the first place; but a demand must be made before recovering the rate. The absence of a demand does not affect the liability; the debt exists and is due before the demand is given, but is not enforceable until the demand is made: *Mayor, &c., of Auckland v. Irvine and Stevenson's St. George Co., Ltd.*(8).

[To MYERS, C.J.] If it is a debt, it is payable by someone. The rating charge arises on the making of the rate.

In the definition of "rateable property," a floor of a building is land or a tenement. The Crown is the "occupier" of the tenement here, but it does not come within the exception; but for the fact that there was an owner, the Crown would not be within the exception.

Cornish, K.C., refers to s. 392 of the Municipal Corporations Act, 1933, from which statute the power to rate is derived.

- (5) [1928] N.Z.L.R. 22, 25; [1927] G.L.R. 583, 585. (7) [1931] N.Z.L.R. 177, 204, 207; G.L.R. 63, 75, 77.
(6) [1930] N.Z.L.R. 798, 801; G.L.R. 474, 475. (8) [1926] N.Z.L.R. 734, 738; G.L.R. 538, 540.

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Stanton continues: There is a charge existing on the land, and a definite liability on definite persons—viz., the owner and occupier, at least. It is not necessary to get judgment before imposing a charge: *The King v. Mayor, &c., of Inglewood*(9).

The liability under s. 67 of the Rating Act, 1925, is regulated between the occupier and the owner themselves, and has nothing to do with the liability of the occupier or the owner to the rating authority. The section does not exclude any person, but is based on the assumption that the occupier is primarily liable. Section 70 provides that, in circumstances in which s. 67 operates, the local authority may recover the rates for the owner. Section 65 enables the rating authority to sue the owner. Where s. 70 says "due by an occupier," it means "primarily liable," and refers back to the liability of an occupier under s. 67. The statute has in mind subjects and not the Crown. Having dealt with the occupier, who is made liable by s. 67, if there is an occupier, like the Crown who is not primarily liable, there is nothing upon which s. 70 may operate. The intention of s. 70 is to disregard the occupier, and to make it optional first to sue the owner without suing the occupier.

The position of the Crown's prerogative has been misunderstood in both the *Waipawa Borough v. Public Trustee*(10) and the *Southland Boys' and Girls' High Schools*(11) cases, where the Crown was both owner and occupier; and nothing turned upon the Crown's occupation; the Crown would be exempt; and, if there were no other interest, the land would be exempt: *Ryde on Rating*, 5th Ed. 110. If the owner or occupier could be rated, the land could not be rated. The basis of the rule is that the Sovereign is not bound by the statute and, notwithstanding the Crown being on the roll as occupier, the Crown is not entitled to be so described on the roll. It is a question of law who is the person legally and properly entitled to be included as occupier. The Crown in its public capacity cannot take advantage of a statute by which it is not bound, as it is not expressly named in the Rating Act: *Craies on Statute Law*, 4th Ed. 372; *Cayzer, Irvine, and Co., Ltd. v. Board of Trade*(12); and *Chitty's Prerogatives of the Crown*, 382. The King is here concerned in his public capacity as occupier, and so he claimed that, if he were not on the roll as occupier, he was the occupier referred to in s. 70. He, therefore, claimed that if the rate is not due by the Crown it cannot be claimed from the

(9) [1931] N.Z.L.R. 177, 208; (11) [1931] N.Z.L.R. 881; G.L.R. G.L.R. 63, 77. 487.

(10) [1921] N.Z.L.R. 1104, 1110; (12) [1927] 1 K.B. 267, 294. G.L.R. 643, 646.

owner or any other person. Apart from ss. 67 and 70, all rates are due by owners and occupiers. Where there is no occupier, the owner is deemed to be the occupier: see the definition of "occupier" in s. 2; and see, also, ss. 8 (4), 9, and 11.

- 5 [To MYERS, C.J.] This is rateable property, and there must be someone from whom the rates can be recovered; also s. 70 specifically authorizes the local authority to sue the owner.

Section 12 (3) provides for proceedings against owners, notwithstanding there is an occupier on the roll; under s. 14,
10 the owner may be sued though there may be a known occupier; and by virtue of ss. 16-19, every obligation imposed on one is imposed on the other. Section 49 (3) (4) provides that notice of the rateable value must be given to each occupier, who is deemed to be the owner in respect of liability for rates on the property.
15 Section 52 requires all particulars as to occupiers and owners to be inserted in the rate-book. Consistently the view has been taken, irrespective of ss. 67 and 70, that occupiers and owners are liable for all rates struck in respect of the property: *Mayor, &c., of Auckland v. Speight*(13), which was followed in *Cobden*
20 *Town Board v. Greymouth Harbour Board*(14) and approved in *Oborn and Clark v. Auckland City Corporation*(15); and see *The King v. Mayor, &c., of Inglewood*(16). If there is a debt, and there must be, it must be owing by somebody—i.e., both by owner and occupiers of rateable property.

- 25 In s. 67, the word "occupier" does not mean the person entered as the occupier, but the actual occupier whether he is on the valuation roll or not: *Patangata County Council v. White*(17). The primary liability is only imposed while the occupier continues to be on the valuation roll as such. Section 67 connotes (a) an
30 existing liability on the occupier to pay rates, and (b) a co-existing liability on some other person. In s. 70 the words "by an "occupier" have no meaning, as all rates are due by an occupier or the person deemed to be an occupier; and they neither add to or take from the words "any rate due." In *Oborn's* case the
35 meaning of the word "due" was considered. Section 70 (1) is declaratory and introduces the liability of mortgagees and persons in possession, and should not be so interpreted as to take away an owner's liability.

(13) (1898) 16 N.Z.L.R. 651, 658, (16) [1931] N.Z.L.R. 177; G.L.R. 669. 63.

(14) [1932] N.Z.L.R. 68; G.L.R. 149. (17) (1912) 31 N.Z.L.R. 999; 14

(15) [1935-36] N.Z.L.G.R. 3. G.L.R. 726.

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In s. 253 of the Local Government Act, 1874 (Vict.), there was an express exemption from liability of property in the occupation of the Crown: *Mayor and Corporation of Essendon v. Blackwood*(18). The second error, in *The King and Harris v. Dunedin City Corporation*(19), is reading s. 70 of the Rating Act, 1925, as producing the result that, unless in the particular case the occupier was liable, the owner was not liable. 5

Solicitor-General (Cornish, K.C.) in reply. There is nothing in the Rating Act to support the contention that, on the making of a rate, the owner and occupier become simultaneously liable. 10 A rate has no meaning except *quoad* an occupier. An owner is brought in only when there is a defaulting occupier, or an occupier who the local authority thinks will default, or when the owner himself is the occupier: *Mayor, &c., of Wellington v. Gilmer*(20). The owner is sued not for the rate as such, but for the debt 15 owing.

An owner must be made liable by express words, such as "primarily"; and where used in s. 70, this is explained in subs. 2: *Mayor, &c., of Wellington v. Mayor, &c., of Miramar*(21). The Crown is under no obligation to pay rates—s. 392 of 20 the Municipal Corporations Act, 1933; and no person may be rated in respect of land occupied by the Crown: *Harris's case*(22).

It is clear from ss. 9 to 11 of the Rating Act, 1925, that if there is no real occupier, an artificial one must be found. The rate is a charge on the land: *The King v. Mayor, &c., of Inglewood*(23). 25 The charge in a building occupied by separate tenements or flats is on the interest in the particular portion; and the debt is due, by the occupier, and is limited to the occupier's interest: *Inglewood case*(24). Plaintiff's argument can only succeed by doing violence to ss. 67 and 70, by interpreting them in a way 30 that previous Courts have not so construed them—e.g., *Harris's case*.

Stanton [to MYERS, C.J.] The charge must be on the whole, and must be referable to the assembled interest of the occupier—i.e., against both owner and occupier. 35

Cur. adv. vult.

(18) (1877) 2 App. Cas. 574, 587.
(19) [1936-37] N.Z.L.G.R. 219.
(20) (1913) 33 N.Z.L.R. 83, 86; 16 G.L.R. 1, 2.
(21) (1913) 33 N.Z.L.R. 392, 396.

(22) [1936-37] N.Z.L.G.R. 219.
(23) [1931] N.Z.L.R. 177, 202; G.L.R. 63, 74.
(24) [1931] N.Z.L.R. 177, 204; G.L.R. 63 75.

MYERS, C.J. The short question in this case is whether the plaintiff Corporation is entitled to recover general rates in the circumstances set out in the consent order made by *Callan, J.*, on December 10, 1937.

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- 5 The question falls to be decided upon the terms of our own legislation. As pointed out in the judgment of this Court in *The King v. Mayor, &c., of Inglewood*(1), the position in regard to rating is different in this country from the position in England. In England, if a rate is not paid, it is recoverable only by distress
10 and sale of the goods of the defaulter. It is not charged on the land. It is purely a personal charge in respect of land. In New Zealand the rate is charged on the land. "It is clear," says Lord Wright, in *Mount Albert Borough v. Australasian Temperance and General Mutual Life Assurance Society, Ltd.*(2), citing the
15 *Inglewood* case(3) "that the charge on the rates is a charge on land "in New Zealand"(4).

- The position as it exists in England was considered by the Court of Appeal in the very recent case of *Liverpool Corporation v. Hope*(5), where it was said by *Slessor, L.J.*, that a rate is not a
20 common-law liability but is the creature of statute, and it was held that no action lies to recover rates, the only remedy being that of distress given by statute. In New Zealand, although when a rate is made, a charge is created upon the land in respect of which the rate is made to secure payment of the amount thereof
25 upon the due date, the enforcement of that charge is subject to the recovery of judgment for the rate within the time limited by s. 77 of the Rating Act, 1925: the *Inglewood* case(6). Again, it is said: "In our opinion, all rates, whether general, separate,
30 "or special, constitute in New Zealand a charge when duly made "upon the rateable property in respect of which they are made, "subject, however, to the privileges of the Crown and to any "special statutory provisions which prevent the charge from "operating or from operating to its full extent. The charge "operates as a security for the payment of the rate upon its due
35 "date, and is subject, from the point of view of enforcement, to "the recovery of judgment within the time limited"(7).

Chapman, J., had previously held under s. 60 of the Rating Act, 1908, which is now reproduced in s. 65 of the Rating Act, 1925, that after demand and failure to pay as therein provided,

(1) [1931] N.Z.L.R. 177, 200; G.L.R. 63, 73.

(2) [1937-38] N.Z.L.G.R. 65.

(3) [1931] N.Z.L.R. 177, 202; G.L.R. 63, 74.

(4) [1937-38] N.Z.L.G.R. 65, 69, 1. 16.

(5) [1938] 1 All E.R. 492.

(6) [1931] N.Z.L.R. 177, 202; G.L.R. 63, 74.

(7) *Ibid.*, 208, 77.

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a rate is a statutory debt: *Karori Borough v. Buxton*(8). Even so, before a rate can be recoverable as a debt, it is necessary to ascertain the person as against whom it is recoverable, and this liability must be sought for in the statute.

The power to make and levy rates is not conferred by the Rating Act itself. In the case of a city or borough it is conferred by s. 77 of the Municipal Corporations Act, 1933, which enacts that the Council may from time to time, as it thinks fit, make and levy on all rateable property within the borough a general rate not exceeding a certain amount in the pound. All other powers relating to rating (see s. 99 of the Municipal Corporations Act) are to be found in the Rating Act itself.

It is true that His Majesty is named in the rate-book as the occupier of the premises in question, but it has been laid down that rates are not chargeable against the Crown: *Public Trustee v. Waipawa County and the Attorney-General*(9). Mr. Stanton says that in that case the Crown was both occupier and owner, but that does not affect the general principle. The immunity of the Crown may arise in any particular case in one or more of three ways: (a) By the exemption in the definition of rateable property in the Rating Act; (b) by reason of the statutory provision which is now s. 392 of the Municipal Corporations Act, 1933; and (c) by reason of the Royal prerogative.

I refer, first, to s. 392 of the Municipal Corporations Act, 1933, which section is as follows:

(1) Except as otherwise specifically provided herein, nothing in this Act or in any regulations or by-laws under this Act shall be construed to apply to or shall in any way affect the interest of His Majesty in any property of any kind belonging to or vested in His Majesty.

(2) Except as provided in the last preceding subsection, this Act and the regulations and by-laws thereunder shall apply to the interest of any lessee, licensee, or other person claiming an interest in any property of the Crown in the same manner as they apply to private property.

It is to be observed that in this case the company is not a "lessee, licensee, or other person claiming an interest in any property of the Crown." It is the owner of the property, the Crown being the lessee. While, therefore, the section may exempt the Crown from any liability, it does not itself operate to create a liability upon the defendant so far as rates are concerned.

I come then to the definition of "rateable property" in the Rating Act, 1925. It is there defined as meaning

all lands, tenements, or hereditaments, with the buildings and improvements thereon, with the following exceptions:

(a) Lands vested in His Majesty of which there is not an owner or occupier, as herein defined, other than His Majesty.

(8) [1918] N.Z.L.R. 730; G.L.R. 472. (9) [1921] N.Z.L.R. 1104; G.L.R. 643.

It may be that that exemption would not by itself be sufficient to exempt the Crown from liability for rates in a case where the Crown is not the owner but a lessee and occupier. The exemption is to be read together with the definition of "occupier," which, so far as is material, is as follows :

Occupier,—

- (a) Means the person by whom or on whose behalf any rateable property is actually occupied, if such person is in occupation by virtue of a tenancy which was for not less than six months certain; and as to rateable property occupied by virtue of a tenancy not coming within the above description, and also in the case of unoccupied rateable property, means the owner of the same; and as to lands of the Crown, whatever may be the term of the tenancy thereof, means the lessee or licensee thereof.

But the question whether or not the Crown as occupier is exempt from rates merely by reason of the exception to the definition of "rateable property" need not be considered, because, in any case, it is exempt by reason both of s. 392 of the Municipal Corporations Act and of the Royal prerogative: *Public Trustee v. Waipawa County and the Attorney-General*(10).

- There is this, however, to be said in regard to the exemption in favour of the Crown in the definition of "rateable property," that it would appear to assume that there may be land vested in the Crown of which there is some other "owner," and on that an argument in favour of the plaintiff Corporation can be founded. But, even so, before the Corporation can succeed, there must still be found some provision in the Act which either expressly or by necessary implication enables it to recover rates from such an "owner."

Section 70 of the Rating Act enacts that

- Any rate or part thereof due by an occupier may also, at the option of the local authority . . . be recovered from the owner, or from any person owning any interest, including an interest as first mortgagee, in the rateable property in respect of which such rate is payable, or from any person actually in occupation of the premises in respect of which such rate is payable.

Then follow provisions giving the owner who pays any rate due by an occupier the right of recourse against the occupier, and also conferring certain rights upon a mortgagee or any person other than the owner who has been compelled to pay rates under the section. It is plain, in my opinion, that this particular section has no application and cannot avail the plaintiff Corporation, because it is fundamental, before the section can be applied, that there must be a rate due by an occupier. Now the occupier here is the Crown, and, seeing that the Crown is exempt from rates, in no sense can there be said to be any rate due by an occupier.

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"Owner" of any rateable property is defined by s. 2 of the Act as being the person entitled for the time being to receive the rack rent thereof.

"Occupier," as appears from the definition already quoted, in the case of unoccupied rateable property, and also where the property is in the occupation of some other person by virtue of a tenancy of less than six months certain, *means the owner* of such property. 5

Section 9 of the Act enacts that where the owner of any property is also the occupier his name shall be entered in the valuation list in the column of occupiers as well as in that of owners. 10

Section 11 (1) enacts that where any property is let for a term of less than three months the owner "shall be deemed to be the "occupier," and shall be "primarily liable" for the rates, and his name shall be entered in the column of occupiers in the valuation list. 15

Now it is to be observed that the words "primarily liable" here refer not to the liability of two or more persons *inter se*, but to the liability to the local authority, because the definition of "occupier" excludes from liability to the Corporation a person to whom a property is let for less than six months. Consequently, although s. 11 (1) says that the owner shall be primarily liable for the rates, it means that he is the only person liable to the Corporation. He may possibly have recourse against his tenant, but, if so, it must be by agreement, as s. 70 (1) would clearly be inapplicable. Subsection 2 of s. 11 enables a tenant to apply to the Council of the local authority to have his name substituted for that of his landlord in the valuation list as the occupier of the property; and if he has the written consent of the landlord to such substitution, then his name is to be inserted in the valuation list, and in such case the tenant shall be "primarily liable" for the rates. In such a case, s. 70 (1) would presumably apply. 25 30

Section 60 enacts that "all rates levied under this Act shall "be recoverable in manner hereinafter provided." 35

Section 61 (1) provides that a demand for any rate due shall be made in writing in the form in the First Schedule to the Act or to the like effect.

Section 65 (1) enacts that if any person fails, for fourteen days after demand thereof, to pay any rate *for which he is liable*, the local authority may recover the same as a debt in any Court of competent jurisdiction. 40

Section 67 (1) enacts that "the occupier" shall be "primarily liable" for all rates becoming due while his name appears in the rate-book as such.

- In *Mayor, &c., of Wellington v. Gilmer*(11) *Williams, J.*, said :
- 5 "The whole principle of the Rating Act is that the rates are to be assessed in accordance with the rateable value of the property, and they are to be paid primarily by the occupier, and if the occupier cannot or will not pay they can be recovered from the owner"(12). A careful consideration of the various sections
- 10 of the Rating Act leads me, with respect, to the same conclusion. The only real exception that I can find is in s. 14, which enacts that, where the name of an owner cannot after due inquiry be ascertained, it shall be entered in the valuation list as "the owner," and he shall be liable to be rated under such designation. There
- 15 is also an apparent exception contained in s. 11 (1), to which I have already referred. I use the words "apparent exception" because, in my view, the exception is not a real one, inasmuch as the liability to rates under that provision arises because the owner is deemed to be the occupier. I do not see how a different
- 20 meaning can be given to the words "primarily liable" in s. 67 from that which they clearly bear in s. 11 (1).

- Except, therefore, where the owner is expressly made liable, and, speaking generally, this is only where he is also the occupier or is deemed by the statute to be the occupier, it seems to me that
- 25 the local authority's only right to recover from the owner arises under s. 70, and that right exists only where there are rates due by an occupier. In this case there are no rates due by an occupier and there is no right to recover from the owner.

- My reason for dealing with the matter at such length as I have
- 30 done, and for referring in detail to the provisions of the statute, is that the question was considered by *Kennedy, J.*, in *The King and Harris v. Dunedin City Corporation*(13), and the present proceeding has been brought for the purpose of reviewing His Honour's decision in that case so far as it concerns the question
- 35 now raised. It follows from what I have said that, in my opinion, *Kennedy, J.*, was right.

- I do not think, however, that the question should be answered in the form in which it is submitted. The question is not so much whether the defendant company is "exempt" as whether the
- 40 plaintiff Corporation is entitled to recover against the defendant,

(11) (1913) 33 N.Z.L.R. 83; 16 (13) [1936-37] N.Z.L.G.R. 219.

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(12) *Ibid.*, 86; 3.

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and, in my opinion, that question should be answered in the negative.

CALLAN, J. The plaintiff Corporation claims that it is entitled to have judgment for these general rates against the defendant company as the "owner" of rateable property in respect of which the rates have been made. The property in question—namely, the seventh floor of a building—is, in my view, "rateable" property within the meaning given to that expression by s. 2 of the Rating Act, 1925. Although His Majesty is the "occupier," the defendant company is the "owner." It cannot be said that there is neither an owner nor an occupier other than His Majesty. Therefore, exception (a) to the definition of "rateable property" does not apply. But although this is so, the defendant company says no judgment can be obtained against it—that this is prohibited by s. 70 of the Rating Act. To this the plaintiff Corporation makes answer that a right to sue the defendant company as owner is conferred as the result of provisions in the Rating Act other than s. 70; and is not taken away or limited by s. 70. Before this submission is considered, there is another question which it is convenient to examine, and that is whether the recovery of these rates from the defendant company is authorized by s. 70.

I did not understand Mr. *Stanton* to contend that the Corporation can rely upon s. 70; but neither did I understand him to admit that it could not. It is therefore at least convenient, and possibly necessary, to commence by considering whether this is a case in which s. 70 authorizes the recovery of the rates from the defendant company as owner.

It is common ground that His Majesty, who is the "occupier," cannot be compelled to pay the rates. The Crown is exempt from rates by reason of the Royal prerogative; and, as is mentioned later in this judgment, the Crown is also exempt from these rates by s. 392 of the Municipal Corporations Act, 1933. However, the plaintiff Corporation does not dispute that no general rates can be recovered from the Crown, which is in this case "the occupier." This being so, the defendant company points to the fact that the only rates of which s. 70 authorizes the recovery from the owner are rates "due by an occupier." Here, the defendant company says no rates are due by this occupier, and that, therefore, s. 70 does not apply. This is conclusive that s. 70 does not authorize the recovery of these rates from the defendant company as owner, unless it can be that, although H

Majesty cannot be compelled to pay the rates, nevertheless they are "due by him" within the meaning to be given to the expression "due by an occupier" where it occurs in s. 70.

- For more than one reason I am not able to accept this. In
- 5 the first place, this would require a forced and unusual meaning to be given to the words "due by an occupier." Cases in which the word "due" has been interpreted will be found collected in *Stroud's Judicial Dictionary*, Vol. 1, 578, and in the *Supplement*, 314. I do not refer to them in detail. I content myself
- 10 with saying that the use of the word "due" normally connotes not only a debt, but that the time for payment has arrived. That was the meaning put upon the word "due" *quoad* ss. 61 and 77 of the Rating Act by the majority of the Court of Appeal in *Oborn and Clark v. Auckland City Corporation*(1), although they rejected
- 15 the submission that a rate is not due until it is forthwith recoverable by action. They held it was due as soon as the time for payment had arrived, and although certain other conditions had yet to be complied with before it would be recoverable by action. Occasionally, in an exceptional context, the word "due"
- 20 may be applicable to a debt contracted but not yet payable. But, here, what has to be accepted before it can be held that s. 70 authorizes the local body to sue this owner is that the words "due by an occupier" are apt to describe a sum of money which any other "occupier" than the Crown would owe and be
- 25 compellable at some time to pay, but which the Crown, because it is the Crown, will never have to pay, although it is the occupier. That goes far beyond what was decided in *Oborn's* case and is, I think, inconsistent with the accepted use of language. I cannot formulate any sense in which a sum of money can be said to be
- 30 "due by a person" who is not and never will be under any obligation to pay it.

- However, there is a further difficulty in the way of holding that s. 70 applies to and covers this case, and authorizes recourse by the local body against this particular owner. Let it be assumed,
- 35 contrary to my opinion, that in some sense which I find it impossible to define, these rates which the Crown can never be compelled to pay are *due* by it as occupier. These are municipal rates. The power to make them is conferred not by the Rating Act, but by the Municipal Corporations Act, 1933. Section 392 (1)
- 40 of that statute is as follows:

Except as otherwise specifically provided herein, nothing in this Act or in any regulations or by-laws under this Act shall be construed to apply to or shall in any way affect the interest of His Majesty in any property of any kind belonging to or vested in His Majesty.

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If it be held that these municipal rates are due by His Majesty, then, in my opinion, that would involve that something in the Municipal Corporations Act—viz., the power to make municipal rates—had been construed so as to apply to the interest which His Majesty has in this seventh floor as the lessee and occupier thereof. It is true that the rates are made in respect of the seventh floor and not merely in respect of His Majesty's interest therein as lessee. But, if these rates are due by him, they must be so due by virtue of his tenancy and occupation. He has no other connection with the rated premises. Therefore, to hold that these rates are due by him necessarily involves that something in the Municipal Corporations Act has been so construed as to apply, to that extent, to the interest His Majesty has in the property. But that is forbidden by s. 392 (1) of the Municipal Corporations Act, 1933. Independently of that provision, in my opinion, the prerogative prevents these rates from being due by His Majesty. I conclude then that these rates are not due by His Majesty, and that s. 70 of the Rating Act does not apply to this case, and that the plaintiff Corporation cannot base its claim upon that section.

I pass to consider the way in which the claim of the plaintiff Corporation was based during the argument. It was contended that a right to sue the defendant company as owner exists under the Rating Act apart from s. 70, and despite the language of that section. But no section other than s. 70 could be pointed to as dealing with the precise topic of suing an owner. What was relied upon was the circumstance that these premises appear to be within the definition of "rateable property," and not to come within the exception thereto in which Crown property is dealt with. To this was added a submission that the liability of an owner, as well as that of an occupier, is in accordance with the general scheme of the statute. I agree that when it is found that the premises are within the statutory definition of rateable property, it is reasonable to expect to find, upon a consideration of the substantive provisions of the statute, that there is some person from whom the rates can be recovered. It may also be that Mr. Stanton is justified in contending that the general scheme of the statute is that, from the moment when rates duly made first become payable, they are debts due both by the owner and the occupier; and that, from the moment they are made, the rates constitute a charge upon the rateable property in respect of which they are made. But I do not think this method of attempting to establish the liability should be accepted. It means that the Court is asked

to infer the mind of Parliament upon a particular topic, and that topic the imposition of monetary liability on a citizen, merely from a definition and a consideration of the general scheme of the statute, and from this material to arrive at a result other than
5 that reached by considering the only specific statutory provision which deals with the topic. I express no opinion as to how it would have been proper to answer the question had there been no provision in the statute specifically dealing with the precise topic. But s. 70 is such a provision. It deals with the question
10 of suing an owner, and is the only section that deals with it. In my view, it does not cover the case; and, in my view, that disposes of the question.

It may be that this result is one which, in view of the terms of the definition of rateable property, is unexpected. There is
15 force in Mr. *Stanton's* observation that, if this property is rateable, one would expect there to be some one who could be compelled to pay the rates. But when it is suggested that the person liable is the owner, and it is discovered that although there is a specific substantive enactment dealing with the recovery of rates from
20 owners, this particular owner is not within that enactment, then, in my opinion, this particular owner escapes. To hold otherwise would be unsafe and would substitute a conjecture as to the intention of the Legislature for a clear discovery thereof. During the argument, reference was made to the fact that by virtue of
25 the definition of "occupier" in s. 2, where land is unoccupied, or is occupied by a tenant whose tenancy is for less than six months, the "owner" is, by force of the statutory definition, made the "occupier." But it has not been enacted that when the "occupier" is for some reason personal to himself exempt from
30 paying rates, the "owner" shall be the "occupier," and liable as such.

On behalf of the plaintiff Corporation, a submission was made that His Majesty had, in the circumstances, chosen to take advantage of the Rating Act and cannot now refuse to be bound
35 thereby. Counsel for the defendant company objected that this submission is not open in the present proceedings. In my opinion, this objection was well taken and I therefore do not deal with the point.

I am of opinion then that the defendant company is not liable for these general rates. Whether that result has happened *per*
40 *incuriam* or advisedly is irrelevant. It suffices if it is clear, as I think it is, that this is the result of what Parliament has said, and has not said. But I am encouraged to believe that this is the correct conclusion, because I think there might be good reason for designing this result, and there might also be a way in which

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it might come about undesignedly. Or it might be a case in which language chosen, having regard to existing circumstances, was retained and repeated because it was perceived that, as applied to new circumstances, it happened to produce a desired result. If owners who lease premises to the Crown can be made to pay the rates, that might lead to the Crown finding that it cannot lease premises at rentals which would be accepted from other tenants. In effect, that would result in the Crown bearing a burden from which the law exempts it. That may have been foreseen by Parliament. On the other hand, the definition of rateable property and the Crown exception therefrom, and a section (s. 54) in terms similar to the present s. 70, are all to be found as far back as the Rating Act, 1894. But the practice of the Crown Departments being tenants in buildings not owned by the Crown has grown with the growth of Government activities. It may be that when the language now used in s. 70 was first evolved, the possibility of there being an occupier from whom, though he was an occupier, no rates were due, was not present to the mind of the Legislature or its draftsman. At one point in his argument, Mr. *Stanton* submitted that the words "due by an occupier" in s. 70 have no meaning, because, Mr. *Stanton* contended, every rate that is due must be due by an occupier or a person who by force of some provision in the statute is deemed to be an occupier. But the Court cannot solve this controversy by omitting from the section words which Parliament used a great many years ago, and has continuously retained in later consolidations of the rating law. There may be room for speculation as to how and why this language came to be used originally, and to be retained subsequently. But the meaning and intention of Parliament must be ascertained not by speculation, but upon a consideration of the language used by it. In my opinion, the decision of *Kennedy, J.*, in *The King and Harris v. Dunedin City Corporation*(2), of which these proceedings were designed to procure a reconsideration, was right, and the question put to this Court should be answered in favour of the defendant company, in the manner suggested by the Chief Justice.

NORTHCROFT, J. I have had an opportunity of reading the judgments of the other members of the Court and have nothing to add.

Question answered: The plaintiff Corporation is not entitled to recover against the defendant.

Solicitor for the plaintiff: *J. Stanton* (Auckland).

Solicitor for the defendant: *V. R. S. Meredith* (Auckland).

[IN THE COURT OF ARBITRATION.]

In re HAWKE'S BAY LOCAL BODIES'
(BOROUGHES AND TOWN DISTRICTS)
LABOURERS, ETC., INDUSTRIAL AGREEMENT.

CT. ARB.
WELLINGTON

1938.

May 20.

O'REGAN, J.

Industrial Conciliation and Arbitration Acts—Industrial Agreement—Holiday Provisions—Prescribed Holidays falling on Saturday—Interpretation.

A clause in an industrial agreement provided for the payment of all workers covered by it for certain holidays, including New Year's Day and Christmas Day. During the currency of the agreement, Christmas Day, 1937, and New Year's Day, 1938, both fell on a Saturday.

On an application for interpretation of that clause,

Held, That the holidays named in the clause must be paid for irrespective of the day on which they happen to fall.

Cathie and Sons, Ltd. v. Kinsman(1) distinguished.

(1) [1938] N.Z.L.R. 40; G.L.R. 9; 37 Bk. of Awards, 2607.

APPLICATION by the Hawke's Bay Builders' and General Labourers' Industrial Union of Workers for an interpretation of the following clause in the Hawke's Bay Local Bodies' (Boroughs and Town Districts) Labourers, &c., Industrial Agreement, dated

5 August 27, 1937, 37 *Book of Awards*, 2131 :

6. (b) All workers covered by this agreement shall receive and be paid for the following holidays : New Year's Day, Good Friday, Easter Monday, Anzac Day, Sovereign's Birthday (or any other day substituted in lieu thereof), Labour Day, Christmas Day, Boxing Day, and Show Day.

- 10 The following question was submitted to the Court as to the interpretation of that clause : "As Christmas Day, 1937, and "New Year's Day, 1938, fell on a Saturday, which day was outside "the normal 40-hour working-week as provided for in cl. 1 (a) "of the said industrial agreement, would the workers coming
- 15 "under that agreement be entitled (under cl. 6 (b)) to be paid for "those two days ?"

The opinion of the Court was delivered by

O'REGAN, J. The parties herein entered into an industrial agreement on August 27, 1937, the terms of which had been already
20 agreed upon in the Council of Conciliation in the preceding February. A dispute has now arisen as to the meaning of cl. 6 (b).

The question in issue is : Are the workers bound by the agreement entitled to payment in respect of Christmas Day, 1937, and New Year's Day, 1938 ? Both these days fell on a Saturday,

25 Clause 1 (a) of the agreement provides that :

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Except where otherwise provided for, forty hours shall constitute a week's work, to be worked on five days of eight hours each between the hours of 7.30 a.m. and 5 p.m., Monday to Friday, inclusive.

We agree with Mr. Bishop that the case turns purely on the agreement—that the case of *Cathie and Sons, Ltd. v. Kinsman*(1) has no application inasmuch as we are not now concerned with the Factories Act. Mr. Bishop contends, further, that inasmuch as a full week's work had been done before Saturday, no payment is due for a holiday falling on that day. Mr. Kay, for the union, submits that the terms of the agreement show that work is not necessarily limited to forty hours, exclusive of Saturday, and he states that there are no less than fifteen classes of workers, parties to the agreement, who may be called upon to work on Saturday. In our opinion, however, that fact is not really relevant. We hold that the plain meaning of cl. 6 (b) is that the holidays therein named shall be paid for irrespective of the day on which they happen to fall. The question submitted accordingly must be answered in the affirmative.

Question answered: Yes.

(1) [1938] N.Z.L.R. 49; G.L.R. 9; 37 Bk. of Awards, 2607.

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CALLAN, J.

[IN THE SUPREME COURT.]

NEW ZEALAND BREWERIES, LIMITED v. AUCKLAND CITY CORPORATION.

Town-planning—Application to Local Authority for Permit to erect Building—No Town-planning Scheme then prepared and submitted to Town-planning Board—Whether refusal ultra vires—Statute—Construction—Whether Condition to be implied—Town-planning Act, 1926, ss. 13, 34—Town-planning Amendment Act, 1929, s. 5.

The power conferred on local authorities by s. 34 of the Town-planning Act, 1926, as amended by s. 5 of the Town-planning Amendment Act, 1929, to refuse its consent to the erection of a building, may be exercised by a Borough Council which has not, as required by s. 13 (1) of that statute, prepared and submitted to the Town-planning Board before January 1, 1937, a town-planning scheme in respect of all land within the borough.

Compliance with s. 13 (1) of the statute is not an implied condition of the exercise of the power conferred by s. 34.

Nuth v. Tamplin(1) and *Cox v. Hakes*(2) considered.

(1) (1881) 8 Q.B.D. 247.

(2) (1890) 15 App. Cas. 506.

ORIGINATING SUMMONS under the Declaratory Judgments Act, 1908, for determination of a question arising out of the Town-planning Act, 1926.

On September 20, 1937, application was made to the Auckland City Council on behalf of the plaintiff company for a permit to

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erect a new malt-house on portion of the company's property within the boundaries of the City of Auckland. This application was declined by the Auckland City Council on October 11, 1937. The Council purported to act under the powers which the Council
5 claimed to be vested in it under and by virtue of the provisions of s. 34 of the Town-planning Act, 1926, as amended by the Town-planning Amendment Act, 1929, s. 5. The ground of the said refusal to grant a permit was that it appeared to the Council that the erection of the new malt-house on the site upon which it was
10 proposed to erect it would be in contravention of the Council's town-planning scheme if such scheme had been completed and approved under the provisions of the Town-planning Act, 1926, and would be in contravention of town-planning principles.

It was contended on behalf of the plaintiff company that as
15 the Auckland City Council had failed to prepare and submit to the Town-planning Board its town-planning scheme before January 1, 1937, as provided by s. 13 of the Town-planning Act, 1926, it could not, in October, 1937, invoke the provisions of s. 34 of that Act, and that it should have dealt with the before-mentioned
20 application for permission to erect the proposed malt-house having regard only to the Council's building by-laws and without reference to the still uncompleted town-planning scheme.

The question put to the Court by this originating summons was whether, upon the true construction of the said Act, the Council
25 of the Corporation having failed to prepare and submit to the Town-planning Board by January 1, 1937, a town-planning scheme as required by the said Act, the said Council had power at any time after January 1, 1937, to refuse its consent (whether absolutely or conditionally) to the erection of any building, or the
30 carrying-out of any work within its district, or to prohibit the erection of such building, or the carrying-out of such work, merely upon the ground that it appeared to the Council that the erection of such building, or the carrying-out of such work, would be in contravention of the scheme if it had been completed and
35 approved.

James, for the plaintiff.

Stanton, for the defendant.

Cur. adv. vult.

CALLAN, J. Section 13 (1) of the Town-planning Act, 1926,
40 was in the following words:—

(1) The Council of every borough having, according to the census taken in the year nineteen hundred and twenty-six, a population of not less than one thousand shall, before the first day of January, nineteen hundred and thirty,

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prepare and submit to the Board a town-planning scheme in respect of all land within the borough.

The "Board" mentioned in this subsection is the Town-planning Board constituted by the statute. The period mentioned in the subsection for the performance of the duty thereby imposed has been twice extended by Parliament—*viz.*, to January 1, 1932, by s. 3 of the Town-planning Amendment Act, 1929, and to January 1, 1937, by s. 47 (1) of the Finance Act, 1931 (No. 4). In each case the extension was enacted during the currency of the period then authorized by statute. Having regard to the population of the City of Auckland, the Auckland City Council is a Council to which these provisions were always applicable. It has not yet completed nor submitted to the Town-planning Board its town-planning scheme pursuant to this subsection. It has made considerable progress towards the completion of such a scheme, but it is not yet ready with the complete scheme.

Section 34 of the Act, as amended by s. 5 of the Town-planning Amendment Act, 1929, enacts, *inter alia*, as follows :

Any local authority that by this Act . . . is under an obligation to prepare a town-planning scheme . . . may at any time before the scheme has been approved by the Town-planning Board absolutely or conditionally refuse its consent to the erection of any building or the carrying-out of any work within its district, or may definitely prohibit the erection of such building or the carrying-out of such work, if it appears to such local authority that the erection of such building or the carrying-out of such work would be in contravention of the scheme if it had been completed and approved, or would be in contravention of town-planning principles, or would interfere with the amenities of the neighbourhood.

[His Honour then stated the facts as above, and continued:] During the argument, it was admitted by Mr. *James* on behalf of the plaintiff company that, if this question were to be answered merely by a consideration of the actual words used in s. 34, it must be answered in favour of the defendant Corporation. This admission, in my judgment, was properly made. The Council of the defendant Corporation is plainly among those Councils upon which the obligation mentioned in s. 13 was imposed. It was not relieved from it by its own neglect or inability to comply with the obligation within the time given by Parliament. As it was on October 11, 1937, a local authority which by the Act was then under an obligation to prepare a town-planning scheme, and as no such scheme had at that date been approved, it was by virtue of the words actually used in s. 34 empowered to refuse the plaintiff company's application upon the grounds it gave for that refusal. But it is argued by Mr. *James* that there must be read into s. 34, as a condition precedent to the continued possession of the powers thereby given, the condition that the local authority has complied with s. 13 by preparing and submitting its town-planning scheme

before January 1, 1937. It is conceded by Mr. *Stanton* that in a proper case implications or interpolations of such a nature as is here suggested may be made by way of addition to the actual words used by Parliament. The question for determination then is whether the suggested implication or interpolation should be read into s. 34.

As to the principles governing such interpolations, Mr. *James* has referred the Court to a passage in *Maxwell on the Interpretation of Statutes*, 7th Ed., 198, and to two reported judicial utterances, each of high authority. The passage in *Maxwell on the Interpretation of Statutes*, is as follows:

Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. The rules of grammar yield readily in such cases to those of common sense.

The italics are mine, and are intended to direct attention to a portion of the passage that specially bears on this case.

The judicial utterances referred to were by *Jessel*, M.R., and *Lord Herschell*, respectively. The words of the Master of the Rolls are in *Nuth v. Tamplin*(1), and are as follows: "Now any one who contends that a section of an Act of Parliament is not to be read literally must be able to show one of two things, either that there is some other section which cuts down its meaning, or else that the section itself is repugnant to the general purview of the Act"(2). What *Lord Herschell* said is in *Cox v. Hakes*(3), and is as follows: "It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look not only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation"(4).

I have considered the statute as a whole, and, in particular, those portions to which attention was directed by counsel. In

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(1) (1881) 8 Q.B.D. 247.

(2) *Ibid.*, 253.

(3) (1890) 15 App. Cas. 506.

(4) *Ibid.*, 529.

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the result, it is, in my view, impossible to say that, unless this proposed implication or interpolation be made, there will result any manifest contradiction of the apparent purpose of the statute, or any absurdity, or any inconvenience, hardship, or injustice presumably not intended, or the defeat of anything shown to be the main object or intention of the statute. I am not satisfied that s. 13 cuts down or limits the literal meaning of s. 34, or that s. 34, read literally, is repugnant to the general purview of the Act. 5

It was submitted that interference with the common-law rights of property owners in the use and enjoyment of their own properties would result from reading s. 34 literally. This consideration was advanced as a reason why it be not read literally, but as being subject to the limitation sought to be implied. But considerable interference with the rights of property owners was plainly contemplated by the statute, and to make the interpolation or implication suggested in s. 34 would result in the distribution of this interference in an unjust and inconvenient manner. It would also put obstacles in the way of accomplishing a complete and coherent town-planning scheme. 15

It is not disputed by Mr. *James* that decisions against property owners may have been validly given under s. 34 up to January 1, 1937. It is not suggested that such decisions are now rendered null and void by the failure of the City Council to submit its scheme by that date. What is suggested is that the applications may now be renewed. But if the argument now made for the plaintiff company were accepted, although such property owners would have been at least hampered and delayed in the use of their property and may have been completely obstructed because they could not wait and were forced to make other plans, other property owners who applied for building permits only after January 1, 1937, could not be similarly affected. The argument founded upon hardship and injustice seems, therefore, to tell at least as much against the contention of the plaintiff company as in its favour. It certainly does not afford the Court a safe guide. It does not lead to "an irresistible conviction that the Legislature could not possibly have intended" what the words it has used in s. 34 signify. 20 25 30 35

Assuming that the decision, which the plaintiff company submits was *ultra vires*, was, on the contrary, *intra vires*, the plaintiff company has the right to appeal to the Town-planning Board : s. 34 (2). It has not sought to exercise that right. It has also by virtue of s. 29 any right to compensation which it would have had if injuriously affected in the same way by the operation of a scheme finally approved. 40

and, in my opinion, includes any worker, by whomsoever employed, who has a claim against a Harbour Board for damages in respect of an injury suffered in the course of his employment. If it were intended that a worker employed on the wharf, as in the
 5 present case, by the first defendant, should be excluded from the benefit of the amendment although allegedly injured by the negligence of the servants of the Harbour Board, it could easily have been so provided. The second contention is that no action now lies against the Harbour Board owing to the omission of the
 10 plaintiff to give the month's notice before action as required by s. 248 (1). The relevant parts of subs. 5 of that section, invoked in support of the contention, is as follows :—

15 . . . if the respective limits of time prescribed by subsection one hereof are not duly observed . . . then . . . the verdict or judgment shall be for the defendant.

This, I think, does not assist; the subsection, of course, still applies to actions other than actions for damages for injury, but the "limits of time prescribed by the subsection" must be ascertained by reference to the effect on subs. 1 of the proviso.

20 The question is what is "the limitation of time for the commencement of actions, prescribed by the foregoing provisions?" It does not say "the limitation of *three months* for the commencement of actions prescribed by the foregoing provision shall not apply," but puts the matter broadly "the
 25 limitation of time . . . prescribed by the foregoing provisions," and "provisions" is in the plural; there is more than one provision that goes to the question as to the limitation of time. As I have already shown, the requirement of notice is a factor in the limitation of time for the commencement of an
 30 action. Even if the proviso went no further, I think its meaning would be clear, but the question is clinched by the concluding words, inserted, no doubt, *ex abundante cautela*, that "any such action may be brought at any time within six months after the
 35 cause of action arose." This is an enacting provision. The action may be brought within the first month after the cause of action arose, when it would be impossible to give notice in accordance with s. 248.

The present action is brought within the six months, but with only a few days' notice. It is brought within the time prescribed.
 40 Notice not having been given before the end of five months from the cause of action arising, the construction contended for by the Harbour Board would be a negation of the provision that the action can be brought at any time within the six months. The

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fact that, through no notice of action having been given, the Harbour Board has been deprived of the right of tendering amends before action is brought, with consequential rights, as provided by subs. 2 of s. 248, does not affect the clear meaning of the amendment.

The question of law submitted will therefore be answered as follows: The plaintiff is not precluded from recovering in the action herein against the second defendant—the Wellington Harbour Board—by reason only of the month's notice of action, as required by s. 248 (1) of the Harbours Act, 1923, not having been given before issue of the writ herein. Costs, £10 10s., and disbursements to be costs in the cause.

Question answered accordingly.

Solicitors for the plaintiff: *Hardie Boys and Haldane* (Wellington).

Solicitors for the second defendant: *Izard, Weston, Stevenson, and Castle* (Wellington).

[IN THE COURT OF ARBITRATION.]

WHITEHEAD *v.* WAIKOHU COUNTY.

CT. ARB.
GISBORNE.
1938.
Nov. 29;
Dec. 13.
O'REGAN, J.

Workers' Compensation—Non-fatal Accident—Commutation of Weekly Payments—Disposal under Order of the Court—Workers' Compensation Act, 1922, s. 5 (1).

A lump sum is never payable in a non-fatal case unless (a) the employer and worker have so agreed, or (b) unless the Court has given judgment that the balance of the weekly payments be commuted into a lump sum in manner prescribed by s. 5 (1) of the Workers' Compensation Act, 1922. The Court of Arbitration so commuting can prescribe the manner of the disposal of the lump sum for the benefit of the injured worker.

Hodge v. Alton Co-operative Dairy Co., Ltd. (1), referred to.

Rough v. Prouse Lumber, Ltd. (2), mentioned.

Where a worker, aged seventy-three years, was entitled to weekly payments for compensation, and, by the purchase of the home in which he and his wife were living on affectionate terms, he could be saved £24 annually, the Court commuted the payments of weekly compensation, the sum of £300 to be expended in the purchase of the house in the joint names of husband and wife, and the balance administered by the Public Trustee as agreed by the parties.

CLAIM FOR COMPENSATION under the Workers' Compensation Act, 1922.

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The plaintiff was employed by the defendant county as a road-maintenance labourer for many years, and on Wednesday, 5 August 4, 1937, he suffered injury by accident arising out of and in the course of his employment, in consequence whereof he had become permanently and totally disabled. He was seventy-three years old; and the Court heard medical evidence, accepted by the defendant's counsel, that his expectation of life had been 10 materially reduced by reason of the injuries.

Plaintiff asked the Court to award him the balance of the weekly payments in a commuted lump sum; but the defendant, while admitting liability, submitted that the case was not one in which a lump sum should be awarded. The widow, 15 who was in good health, was in her middle sixties, and, though there had been twenty children of the marriage, these had all grown up and none of them was a dependant.

This was not a case where the Court had jurisdiction to order payment to the Public Trustee; but Mr. *Burnard* stated that 20 husband and wife were residing in a house for which they paid a rent of 15s. weekly, and which could be purchased for £300, which the Public Trustee considered a reasonable price; and Mr. *Burnard* undertook that, if the Court would order payment of a lump sum, the house would be purchased in the joint names of 25 husband and wife, and the balance of the fund administered by the Public Trustee.

Burnard, for the plaintiff.

J. Blair; for the defendants.

Cur. adv. vult.

30 The judgment of the Court was delivered by

O'REGAN, J. A lump sum is never payable in a non-fatal case unless (a) the employer and worker have so agreed, or (b) unless the Court has given judgment that the balance of the weekly payments be commuted into a lump sum in manner prescribed 35 by the Act: *Hodge v. Alton Co-operative Dairy Factory Co., Ltd.*(1), and cf. *Rough v. Prouse Lumber, Ltd.*(2). In a fatal case, on the other hand, the right to the full amount of compensation vests in the dependants immediately on the death of the worker, and should the sole dependant die before the compensation has 40 been paid, or even claimed, the amount becomes part of

(1) (1914) 17 G.L.R. 139.

(2) (1909) 12 G.L.R. 151.

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the deceased dependant's estate : *Darlington v. Roscoe and Sons, Ltd.*(3) ; *United Collieries, Ltd. v. Simpson*(4) ; and *Bodell v. William Cable and Co., Ltd.*(5). It remains to be added that the right of the dependants to compensation is separate from and independent of the right of the injured worker, and so, if he should die as the result of the injuries while he is in receipt of weekly compensation, the balance for the remainder of the period of liability becomes payable to the dependants. This is in virtue of s. 54 of the Workers' Compensation Act, 1922, but that section is in reality declaratory of the law as explained by this Court (per *Chapman, J.*) in *Vollheim v. Buick*(6). 5 10

Mr. *Blair* argues that the wife's interests can best be served in the case before us by the continuance of the weekly compensation in that, should the plaintiff die of his injuries before the period of liability shall have expired, the widow will then be assured of the balance of compensation. We have the fact, however, that husband and wife are living together on affectionate terms and that the Whiteheads are an exemplary family. The purchase of the house will mean a saving of £39 a year in rent, or a net saving of £24 annually, estimating interest on £300 at 5 per cent., and, as Mr. *Burnard* has undertaken that the plaintiff will agree to the administration of the fund by the Public Trustee, we have decided to award a lump sum. Accordingly, the balance of weekly compensation will be commuted as from the date of the last payment, and no doubt the parties will agree on the amount, the sum of £300 to be utilized in the purchase of a home in the joint names of husband and wife, the balance to be administered by the Public Trustee as agreed by the parties. We allow £5 5s. costs, and £2 2s. for one medical witness. 15 20 25

Judgment accordingly.

Solicitors for the plaintiff : *Burnard and Bull* (Gisborne).

Solicitors for the defendants : *Blair and Parker* (Gisborne).

- (3) [1907] 1 K.B. 219 ; 9 W.C.C. 1. (5) [1921] N.Z.L.R. 211 ; G.L.R. 161.
(4) [1909] A.C. 383 ; *sub. nom.* *United Collieries, Ltd. v. Hendry*, (6) (1904) 7 G.L.R. 424.
2 B.W.C.C. 308.

[IN THE SUPREME COURT.]

PEARSE *v.* THAMES VALLEY ELECTRIC-
POWER BOARD.S.C.
AUCKLAND.

1938.

Nov. 9, 17.

CALLAN, J.

Industrial Conciliation and Arbitration—Award—Forty-hour Week—Award providing for Forty-six-hour Week—Ordinary Normal Working-week Forty-hours—General Order reducing Hours to Forty per Week—Workers' Hourly Wages not Reduced or Increased—Industrial Conciliation and Arbitration Amendment Act, 1936, s. 21 (3).

The purpose of s. 21 (3) of the Industrial Conciliation and Arbitration Amendment Act, 1936, is that workers who have enjoyed the actual benefits of an ordinary rate of weekly wages should not have their weekly wages reduced by reason of the forty-hour week.

An award prescribed a forty-six-hour week, and a worker thereunder was entitled to an hourly rate of wages. For some years the duration of the ordinary normal week worked was forty hours, and the worker had been paid the hourly rate prescribed by the award. The General Order of the Court of Arbitration of September 7, 1936, which reduced to forty hours the working-week so prescribed, did not reduce the worker's normal weekly working-hours or his consequent normal weekly earnings.

Held, That the worker was not entitled to have his ordinary rate of wages determined by a computation of forty-six times the hourly wage, as there had been no reduction in the number of his actual working-hours.

APPEAL from the Magistrates' Court on a question of law.

The respondent Board was bound by the Northern Industrial District Electrical Workers (Electric-power Boards, &c.) Award, made on December 17, 1930 (*30 Book of Awards*, 979). The
5 appellant had been for some years in the employment of the respondent Board as an assistant linesman. Under the award, his minimum rate of wages was fixed at 2s. an hour. If he should be employed for more than forty-six hours in any one week, or beyond certain named hours on any working-day, he became
10 entitled to payment at overtime rates. Shortly after the award was made, the respondent Board commenced and had ever since continued to provide for its employees generally, and for the plaintiff in particular, only forty hours' work per week, not forty-six hours. It had throughout paid them, including the plaintiff,
15 at the full hourly rates set out in the award. At no time did it take advantage of the 10-per-cent. reduction in wages which was authorized.

The appellant, since the making of the General Order of September 7, 1936, received the hourly rate fixed by the award.

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He contended that this was an underpayment, and that he was entitled to receive forty-six fortieths of the rate prescribed by the award, and he sued for the difference. The learned Magistrate found for the respondent.

Tuck, for the appellant.

Lisle Alderton, for the respondent.

5

Cur. adv. vult.

CALLAN, J. [After stating the facts, as above:] The award does not confer upon the appellant any right to be paid for time during which he does not work. He has no right to demand 10 employment throughout or payment for forty-six hours per week. If he is required to work more than forty-six hours in any one week, he becomes entitled to payment at overtime rates. That is the only right conferred upon him by the award, by reason of the provision therein that forty-six hours shall constitute a week's 15 work.

By s. 21 of the Industrial Conciliation and Arbitration Amendment Act, 1936, the Court of Arbitration was empowered to amend existing awards and industrial agreements by introducing the forty-hour week. In exercise of the power conferred by this section, 20 an order was made by the Court of Arbitration on September 7, 1936, reducing to forty hours per week the working-hours fixed by several awards and industrial agreements, including the award mentioned above. Subsection 3 of the said s. 21 is in the following words:— 25

(3) Where by an order of the Court made under this section the maximum number of hours to be worked in any week, as fixed by any award or industrial agreement, is reduced, any rates of pay fixed in the award or agreement shall, if necessary, be increased, either directly by the Court or indirectly by the operation of the order so that the ordinary rate of weekly wages of any worker bound by the award or agreement shall not be reduced by reason of the reduction made in the number of his working-hours. 30

Neither by the order of September 7, 1936, nor otherwise has the Court of Arbitration pursuant to that subsection increased the rates of pay fixed by the award. Since the order was made, the Board 35 has continued to pay the appellant at the hourly rates fixed by the award. He contends that this is an underpayment, that the rate to which he is entitled has become forty-six fortieths of that named in the award. He has sued for the difference.

The contest between the parties is as to whether this subsection 40 (21 (3)) has or has not any application to the present case. That depends on the interpretation of the subsection, and, in particular, upon the meaning to be given to the words "the ordinary rate

“of weekly wages of any worker,” which occur therein. It appeared to me during the argument, and I am still disposed to think, that there may be workers who cannot obtain any benefit from the subsection because they have not in truth any ordinary

5 rate of weekly wages, but only an average amount of weekly earnings, with no normal number of working-hours, and consequently no ordinary rate of weekly wages. But neither counsel contended that this was the appellant’s position, nor do I think it is. For the appellant it was contended that his ordinary rate

10 of weekly wages was forty-six times 2s., because forty-six hours was the maximum number of hours at which he could, under the award, be required to work at the ordinary as distinguished from an overtime rate of payment. For the respondent Board it was contended that his ordinary rate of weekly wages was forty times

15 2s., because forty hours was, and had been for some years, the duration in hours of his ordinary or normal week. Therefore, the Board contends he did not, by the order of September 7, 1936, suffer any reduction in the number of his working-hours, and therefore, it was contended, the subsection has no application to his

20 case. It was contended for him, on the other hand, that the subsection applies, and that its effect is that his rates of hourly pay, as fixed by the award, are, by the indirect effect of the order, increased by forty-six fortieths. For the appellant, Mr. *Tuck* supported this submission by a careful and detailed examination

25 of the words of the subsection, and by examples of its application to other possible cases. He contends that his interpretation is more in conformity with the way language is used in industrial statutes, awards, and agreements than is the construction supported by Mr. *Alderton*. He also contends that under his

30 interpretation the application of the subsection to other cases to which it might have to be applied becomes simpler and clearer than under Mr. *Alderton’s* interpretation.

I think I may properly acknowledge that Mr. *Tuck’s* full and careful argument satisfied me that the interpretation of this

35 subsection is not so clear as I was at first disposed to think. But Mr. *Alderton* was able to produce some answer to all Mr. *Tuck’s* submissions. In the end, after giving careful attention to everything that was said by both counsel, I think the safest guide to the intention of Parliament in this matter is supplied by Mr.

40 *Alderton’s* comment that the subsection is merely a subsidiary provision in an enactment of which the primary purpose is to facilitate the introduction of the forty-hour week.

The only purpose I can see clearly revealed by the language of this subsidiary subs. 3 is that certain workers who have enjoyed the

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actual benefits of an ordinary rate of weekly wages shall not find their weekly earnings reduced by reason of the introduction of the forty-hour week. Workers paid by the hour, who normally worked for forty-six hours a week or for any normal number of hours greater than forty, would suffer unless their hourly rates of pay were increased. But this particular worker, and the other hourly workers of this particular employer, have not in truth had their hours of labour or their consequent normal week's earnings reduced by the order. Therefore to increase their hourly rates of pay would be to compensate them for a loss or reduction which they have not suffered, and I am unable to construe the subsection as requiring that to be done. 5 10

I therefore agree with the result reached by the learned Magistrate, and the appeal is dismissed with costs £8 8s.

Appeal dismissed.

Solicitors for the appellant: *Tuck and Bond* (Auckland).

Solicitors for the respondent: *Lisle Alderton and Kingston* (Auckland).

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Car for his own Purpose—
Accident while attempting to
leave Car in Motion—Added Risk
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Whether Accident "Arising out
"of and in the course of the
"employment"—Workers' Com-
pensation Act, 1922, s. 3 (1)
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See WORKERS' COMPENSATION. 3.

TRANSPORT LICENSING.

1. — Carriage of a Private Party on
"a special occasion"—Meaning of Words—
Transport Licensing Act, 1931, s. 21 (b).

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TION : SCOTT v. DUNEDIN CITY
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2. — "Heavy motor-vehicle"—
"Motor-lorry"—"Maximum load"—
Whether Motor-vehicle to which Heavy-
traffic License refused, the Gross Weight
of which and its Load exceed Two Tons,
within the Heavy Motor-vehicle Regulations,
1932—Public Works Act, 1928, s. 166—
Motor-vehicles Act, 1924, s. 2—Heavy
Motor-vehicle Regulations, 1932 (1932 *New
Zealand Gazette*, 302), Regs. 1 (2), 5 (7),
9 (9).

HAZLEDON v. BHAGA BHULA - S.C. 275

— Motor-vehicles—Regulations—
Heavy-traffic Licenses—Local
Authority's Reduction of
Licensing Fees—*Ultra vires*—
Public Works Act, 1928, ss.
166 (2) (c) (d), 173—Heavy
Motor-vehicle Regulations, 1932
(1932 *New Zealand Gazette*, 302),
Reg. 10 (6), (7) - S.C. 17

See MOTOR-VEHICLES.

TRESPASS.

See RIVER BOARD.

ULTRA VIRES.

See BY-LAW.

— Heavy-traffic Licenses.
See MOTOR-VEHICLES.

WATERWORKS.

— Rating—"Waterworks"—Whether s. 244 of the Municipal Corporations Act, 1933, to be invoked for the interpretation of the Exemption Provisions in the Rating Act, 1925—Rating Act, 1925, s. 2 (k)—Municipal Corporations Act, 1933, s. 244

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See RATING—RATEABLE PROPERTY AND EXEMPTIONS.

WORDS AND PHRASES.

"Arising out of and in the course of employment" - Ct. Arb. 11
See WORKERS' COMPENSATION. 3.

"During any function therein of which
"dancing forms a part" S.C. 21
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"Heavy motor-vehicle" - C.A. 275
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"Motor-lorry" - S.C. 275
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"Not inconsistent with this Act" F.C. 196
See RATING—GENERAL.

"Nuisance" - C.A. 51
See MUNICIPAL CORPORATION.

WORDS AND PHRASES—continued.

"Remains actually vacant and un-occupied" - F.C. 185

See RATING—RATES AND RATE-BOOK. 1.

"Special occasion" - S.C. 177
See TRANSPORT LICENSING. 1.

"Under any other Act" - S.C. 259
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"Waterworks" - C.A. 268
See WATERWORKS.

"Worker" - C.A. 30
See HARBOUR BOARD.

WORKERS' COMPENSATION.

1. — Coronary Thrombosis — Heart Diseases — Death during Employment — Effect of Effort—Onus of Proof—Workers' Compensation Act, 1922, s. 3.

JARVIS v. ONE TREE HILL BOROUGH
Comp. Ct. 221

2. — Hernia—No Discomfort or Pain at Time of Special Effort—Continuation of Heavy Labour for Two Days afterwards—Subsequent Operation—Onus of Proof not discharged by Worker—Workers' Compensation Act, 1922, s. 3.

WATSON v. NORTHCOTE BOROUGH
Comp. Ct. 237

3. — Motorman, having handed over Tram-car to his Successor, continuing in Car for his own Purpose—Accident while attempting to leave Car in Motion—Added Risk not incidental to Employment—Workers' Compensation Act, 1922, s. 3 (1)

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GOODMAN v. NAPIER HARBOUR BOARD.

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Contract—Construction—Contract for Erection of Wharf for Harbour Board—Clause vesting Plant and Materials in Board—Clause empowering Board to determine Contract and seize and forfeit Plant, Materials, and Deposit—Legality thereof—Whether Board exercised such Remedy in pursuance of Statute—Harbours Act, 1923, s. 248.

A clause in a contract for the construction of a wharf by the plaintiff for the defendant provided that in certain events the defendant might determine the contract by notice and

“enter upon and take possession of the works, together with all the plant and materials of the contractor employed by the contractor for the purpose of the works or brought upon the site of the said works or adjacent thereto, and the same shall become the absolute property of the Board without making any payment or compensation therefor, and all sums of money deposited as security for the due performance of the contract, or owing to the contractor, shall be forfeited and become the absolute property of the Board, and all work (exclusive of plant) done up to that time shall be paid for to the contractor at such sums as the engineer shall fix, having regard to the schedule of prices, and to all additions and deductions, and after deducting all payments made on account.”

Another clause provided that all plant and material delivered or brought on to the works for the purpose of being used or employed in or about the same should be the absolute property of the defendant as though they had been legally vested in the Board by absolute assignment.

The defendant, being entitled to do so, determined the contract in the manner provided, and seized and forfeited the plant, materials, and deposit.

In an action claiming damages for conversion and alleging that such seizure and forfeiture were not legal,

Held, That, on the construction of the contract, the clause as above set out was not a machinery clause for the purpose of enabling the Board necessarily to complete the work (which alternative remedy was provided for under another clause), but a clause the intention of which was to entitle the defendant on the determination of the contract absolutely to the plant, materials, and deposit; but there was nothing illegal in the provisions of that clause.

In re Keen and Keen, Ex parte Collins(1), and *Reeves v. Barlow*(2) applied.

Ranger v. Great Western Railway Co.(3) and *Hart v. Porthgain Harbour Co., Ltd.*(4), distinguished.

Semble, In exercising its remedy of enforcing its remedies under the contract, the defendant Board was engaged in a public duty and was doing something in pursuance of the Harbours Act, 1923, and its amendments, within the meaning of s. 248 of that Act, which provides for notice and commencement of action within the periods specified therein.

Bradford Corporation v. Myers(5) and *Vincent v. Tauranga Electric-power Board*(6) referred to.

(1) [1902] 1 K.B. 555.

(2) (1884) 12 Q.B.D. 436.

(3) (1854) 5 H.L. Cas. 72; 10 E.R. 824.

(4) [1903] 1 Ch. 690.

(5) [1916] 1 A.C. 242, 264.

(6) [1935-36] N.Z.L.G.R. 403.

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ISSUES OF LAW, which by consent were ordered under R. 154 of the Code of Civil Procedure to be argued before the trial of the action.

The action arose consequent upon the determination by the defendant Board of a contract whereby the plaintiff contracted 5 to construct a reinforced concrete wharf for the price of £62,910 7s. 4d. in accordance with certain plans, specifications, and special and general conditions of contract.

The facts, and the relevant clauses of the contract, sufficiently appear from the judgment of the learned Chief Justice, where the 10 questions in issue are set out.

L. W. Willis, for the plaintiff.

J. F. B. Stevenson, for the defendant.

Cur. adv. vult.

MYERS, C.J. The action was not brought for breach of 15 contract. It was not disputed that the defendant Board was entitled to determine the contract. On the contrary, Mr. *Willis* expressly admitted during the argument that the actual determination of the contract by the Board was justifiable and valid, meaning thereby, of course, that the circumstances and 20 conditions were such as to justify the Board in determining the contract pursuant to the provisions thereof and to the Board's rights reserved thereby. The action was framed in tort; the claim was for damages for conversion, and the plaintiff's argument was (in the words of Mr. *Willis*) that the seizure and detention 25 of the plant and the forfeiture of the deposit (to which I shall presently refer) were not legal.

The contract was determined under cl. LI of the general conditions, and that clause is as follows :—

In lieu of proceeding under the last preceding clause, the Board may, 30 in any event mentioned in the last preceding clause, or in the event of a breach of cl. IX hereof, and either before or after the time fixed for completion, determine the contract by a notice in writing under the hand of the secretary, served on the contractor or on the Official Assignee, or the assignee 35 under any assignment, and upon the service of such notice the contract shall cease, and the Board may enter upon and take possession of the works, together with all the plant and materials of the contractor employed by the contractor for the purpose of the works or brought upon the site of the said works or adjacent thereto, and the same shall become the absolute property 40 of the Board without making any payment or compensation therefor, and all sums of money deposited as security for the due performance of the contract, or owing to the contractor, shall be forfeited and become the absolute property of the Board, and all work (exclusive of plant) done up to that time shall be paid for to the contractor at such sums as the engineer shall fix, 45 having regard to the schedule of prices, and to all additions and deductions, and after deducting all payments made on account.

The first question raised for argument was "Whether the provisions of Clause LI . . . are illegal and void as alleged in para. 7 of the statement of claim?" It is true that that paragraph seems to allege that the whole of cl. LI is illegal and void, but that was not the contention made on the argument. The validity of the power to enter and take possession of the works under the clause is not now disputed. What is disputed is the validity of that part of the clause which purports to create a forfeiture of the plant, materials, and deposit.

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- 10 It was recognized by counsel that the question could not be answered by reference only to those provisions of the contract (including cl. LI of the general conditions) which are actually set out in the statement of claim, and it was expressly agreed that the whole contract should be placed before the Court, and
15 that the Court should for the purpose of deciding the questions raised look at and consider the whole of its provisions.

- The plaintiff's tender was for the sum of £62,910 7s. 4d., and that tender was accepted. He was required in making his tender to tender for a lump sum, but the conditions required that the
20 tender should be accompanied by a complete schedule of quantities and prices showing how the lump sum had been arrived at. Included in the schedule of quantities and prices is an item "Plant, buildings, &c., lump sum £3,100." This was one of the items included in the total amount of the tender. By the inter-
25 pretation clause in the general conditions of contract, cl. I, it is provided that "plant" shall mean

- every temporary and accessory means necessary, or required by the engineer, to carry out and complete the works and extra works in the time and manner herein provided, and all materials temporarily built into the works or extra
30 works, and shall include all tools, machinery, and appliances necessary for the due execution of the works.

Clause XXIII is as follows :—

- All plant and material delivered or brought on to the works for the purpose of being used or employed in or about the same shall be the absolute
35 property of the Board in like manner as though they had been legally vested in the Board by absolute assignment; and the contractor shall not remove or attempt to remove the same or any part thereof on any pretence whatever, except for the purpose of carrying out the contract, without the consent in writing of the engineer first had and obtained, nor shall the contractor
40 without such previous written consent, assign, or otherwise deal with, or purport or attempt to assign or otherwise deal with, the same or any part thereof. The Board shall in no way be held responsible for the safe-custody of any plant or material placed by the contractor on the works for the purposes of the contract.

- 45 Clause L, under the title "Power to take possession of works," is in the following terms :—

1. If at any time, in the opinion of the engineer, the contractor is unnecessarily delaying the commencement of the work, or after its commence-

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ment is not performing the same in a proper manner, or is guilty of neglect, default, or delay in the execution of the work, either by not procuring the necessary supply of materials or by using unsuitable or unsatisfactory material, or by not progressing with the works or any particular part thereof with sufficient expedition, or by not executing the works or any part thereof in accordance with and in the manner provided for by the specifications, drawings, and these conditions, or by not conforming to the fullest extent to the orders and directions from time to time given by the engineer, and if after one week's notice in writing from the engineer given to the contractor, apprising him of the existence of any such neglect, default, or delay, the contractor shall have failed to rectify and amend the same, or shall still in the opinion of the engineer be proceeding in an unsatisfactory manner, or in case the contractor shall become bankrupt, or shall in the opinion of the engineer commit any wilful breach of the contract, or shall at any time abandon the contract or neglect or omit to pull down, take up, alter, reconstruct, or remove any work, plant, or material which the engineer shall have certified to be defective or not according to the contract within a time to be limited by the engineer, the Board shall have power without voiding this contract, summarily and of its own authority, and without any process of law for that purpose, to take possession of the works, and to take the same out of the hands of the contractor, and to take and retain possession (as the absolute property of the Board) of and use all plant and material then being in, upon, or near the works for the purpose of being used or employed in or about the same (with full power to sell or dispose of any of such plant and material either before or after the completion of the works, crediting the proceeds to the costs of the works, and so that the Board shall not be liable for any destruction, wear and tear, loss, or injury of or to any such plant and material so taken or used by it as aforesaid), and thereupon the contractor shall (save as hereinafter is specially provided) forfeit all claims, rights, and privileges which he or they may have under the contract; and the Board shall have full power and authority with uncontrolled discretion as to price and method to employ any person to do or perform anything which in the opinion of the engineer the contractor has failed to do, or perform, or in the opinion of the engineer has done other than in accordance with the contract, and also to complete the work under the direction in all things and to the satisfaction of the engineer, and so that the engineer may exercise all or any of the powers and discretions given to him by the specifications or these conditions, and to purchase all plant and material necessary for use in or for the execution of the work, or to enter into any new contract for the completion of the same or any part thereof under the like direction and to the like satisfaction and subject to the present or any other conditions of contract.

2. Upon the final completion of the works the engineer shall certify in writing to the Board, whether the total actual cost of the works to the Board after taking into account all additions, omissions, and other deviations, directed either before or after such taking possession of the works, and including in such cost, damages at the rate specified in the conditions for any delay beyond the original contract time, that shall eventually be occasioned in completing the works less any such damages recoverable and actually recovered from any new contractor should any new contract be entered into as aforesaid, has exceeded, or otherwise, the sum which the works would in the opinion of the engineer have cost the Board had the contractor in every respect duly and faithfully carried out the contract.

3. If such certificate shall show any such excess, the same shall be a debt recoverable by the Board, from the contractor on demand.

4. If the certificate shall show that such actual cost of the works was less than the before-mentioned total sum, the Board shall pay or allow to the contractor the difference, less any moneys, damages, compensation, costs, expenses, or other sums owing by the contractor to the Board, or recoverable by the Board from the contractor or in respect of which the contract is to indemnify the Board on any account whatever, and whether in connection with this present contract or not, and the engineer shall grant authority to the contractor or his representative for the removal of all surplus material,

implements, or plant employed on the works originally belonging to the contractor or purchased by the Board for the purposes of the contract for the value of which credit has not been given to the contractor as before mentioned.

- 5 5. Such certificate of the engineer as aforesaid shall be conclusively binding on each side, and his assessment in such certificate of the damage for delay shall also be final, and shall not be questioned on the ground that some or all of the delay has been occasioned by the Board, or any new contractor, or on any other ground whatever.

- 10 Clause LI, under the title "Board may terminate contract," I have already set out(1).

Clause LIV says that

the amount (if any) deposited in accordance with cl. XIII of the conditions of tender is to be held by the Board as security for the due performance and observance of the contract . . .

- 15 Clause XIII of the conditions of tender provides for the contractor making a deposit in lieu of sureties and bond, and in accordance with this provision the plaintiff lodged a deposit of £1,250. The clause says :

- 20 The amount of such sum [i.e., the deposit] shall be retained by the Board subject to the provisions of cl. LIV of the general conditions of contract.

Clause LVI of the general conditions provides for progress payments and for the retention by the Board, until the expiration of thirty-one days after final certifying, of 25 per cent. of the value of the work done.

- 25 Clause LVIII of the general conditions is as follows :—

- After the works shall have been completed and finally taken off the hands of the contractor the engineer shall give an order to the contractor entitling him to remove and take away all machinery, plant, implements, tools, staging, and materials of every kind provided by him, and which shall not have been used or otherwise dealt with according to these conditions, and the contractor shall thereupon remove and take away all such machinery, plant, &c., and leave the whole of the works and site free and clear. Provided always that nothing herein contained shall entitle the contractor to have returned or handed to him any plant or material except such as has been paid for by him for which he shall not have been recouped by the Board. Provided always that in removing or taking away such machinery, plant, &c., the contractor shall not damage or injure the works or site thereof, and if the contractor shall so damage or injure them will forthwith make good the same.

I do not think that I have omitted from the various documents constituting the contract anything of real materiality to the question now under consideration.

- I have examined all the authorities that were cited, but in none of them have I found a contract containing conditions precisely like those in the present case. Here the Board had alternative remedies under cls. L and LI of the general conditions of contract. Under cl. L it had the right in any of the events therein mentioned to take the works out of the hands of the

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contractor and complete the contract itself or by another contractor, but in such case the contract would remain in existence; there would be no forfeiture of the deposit; and accounts would have to be taken in due course as between the parties. Whether and to what extent in such circumstances the Board would have had to account for the value of plant it is unnecessary to consider, because cl. L was not acted upon. The Board elected instead to exercise its alternative remedy under cl. LI. Another important point to observe in the present contract is that it contains in respect of plant and materials not only a vesting clause (cl. XXIII) but also a forfeiture clause (cl. LI). It is also to be observed that there is one thing that the contract does not do: although cl. LI provides for the forfeiture of the plant and material and the deposit-moneys, it does not purport to work a forfeiture of the £25 per cent. retention-moneys. On the contrary, it provides that all work (exclusive of plant) done up to the time of the determination shall be paid for to the contractor. I assume that the words "exclusive of plant" are inserted for one or other or both of two reasons—namely: (i) that since the value of the plant was included in the contract price it might have been partly at least paid for by inclusion in the progress payments; and (ii) that in any case cl. XXIII provides that all material and plant delivered or brought on to the works for the purpose of being used or employed in or about the same shall be the absolute property of the Board.

The authorities show that the whole question is one of the construction of the particular contract. That is clear from the speech of the Lord Chancellor (*Lord Cranworth*) in *Ranger v. Great Western Railway Co.*(2). This is what His Lordship says: "The right of the appellant to such an account depends on the question whether, according to the true construction of the agreement, the respondents were, on taking possession of the plant, to become absolute owners of it to all intents and purposes; or whether the possession was only to be for the purpose of enabling them to go on with the works, and to complete them at the risk and cost of the appellant, holding the plant as a security, so far as it would go, for whatever outlay, if any, they might have to make, beyond what they would have had to pay under the contract in case the appellant had duly performed his engagements. The provisions of the contract are very explicit. First, upon the appellant's default, after the seven days' notice, the respondents were authorized

"to proceed and complete the works themselves, paying for the same out of the money then remaining due to the appellant on account of the contract. Secondly, the payments then already made to the appellant were to be taken as full satisfaction for all works then already done by him. Thirdly, all money then due, or which would thereafter have become due to him under the contract, and all the tools and materials in and about the works, were to become the absolute property of the company. And, fourthly, if the moneys, tools, and materials so to become the property of the company should be insufficient to cover all charges occasioned by completing the works, then the appellant was to make good the deficiency. I assume that, in taking possession of the plant, the respondents did no more than, under these clauses, they were warranted in doing. The question is, whether, having taken possession, they became absolutely entitled to all which they seized, or whether the whole provision is not to be regarded as mere machinery for enabling them to complete the works, at the risk and cost of the appellant. I think the latter is the true construction of the clauses"(3).

All that would be applicable if the defendant Board had acted under cl. L. The position, however, under cl. LI seems to me to be quite different. There is no such machinery provided for in that clause as in cl. L. Clause LI is not in any way a machinery clause for the purpose of enabling the Board necessarily to complete the works. It is merely a clause which permits the Board to determine the contract, and it expressly and in plain terms provides the consequences which are to follow from the determination. There can be no doubt that the intention was to entitle the Board absolutely to the plant and materials and the deposit-moneys in the event of cl. LI being acted upon.

As to cl. XXIII of the general conditions, the vesting clause, the language is stronger than in any of the cases to which I have been referred by counsel. The clause does not say that the plant and materials shall be "considered to be" the property of the Board as was the case in *In re Keen and Keen, Ex parte Collins*(4), nor are the words "deemed to be" used, as is sometimes the case. The words used here are stronger even than was the case in *Reeves v. Barlow*(5), where the provision was that all plant and other materials brought by the builder upon the land should become the property of the landowner; and *Bowen, L.J.*, said: "The moment the goods were brought upon the premises the property

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(3) *Ibid.*, 107, 108; 839.
(4) [1902] 1 K.B. 555.

(5) (1884) 12 Q.B.D. 436.

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"in them passed in law, and nothing was left upon which any
"equity as distinct from law could attach"(6). Here the words
are, "all plant and material . . . shall be the absolute
"property of the Board." As I have already said, I need not
consider what the position would have been in regard to the plant 5
under cl. L had the remedy provided for by that clause
been exercised. Mr. *Willis*, however, relies upon cl. LVIII. In
my opinion, however, that clause does not affect the present
position at all, because it applies only where the works have been
completed by the contractor himself and taken off his hands in a 10
completed state. Even if cl. LVIII did apply, questions might
arise, having regard to the item of £3,100 in the schedule, as to
whether and to what extent the plant had been actually paid for
by the Board, and consequently might be outside the contractor's
right of removal. None of those questions however arise, because 15
the contractor did not complete the works, the contract was
determined, and cl. LVIII has therefore no application.

In *Hart v. Porthgain Harbour Co., Ltd.*(7), the vesting clause
provided merely that the whole of the plant and materials brought
on the ground by the contractor were to be marked with 20
his initials in legible characters, and that "all such plant and
"materials shall be considered the property of the company until
"the engineers shall have certified the completion of the contract,
"and no plant or materials shall be removed or taken away
"without the consent or order in writing of the engineers." There 25
was power under the contract for the company in certain events
to enter upon and take possession of the works, material, plant,
&c., and complete the works. That is to say, there was
a provision corresponding with cl. L of the contract in the present
case, but there was none corresponding with cl. LI. The company 30
had not attempted to complete the works itself or get them com-
pleted by another contractor. It was held by *Farwell, J.*, that the
clause quoted above must be construed as vesting the materials
in the building owner at law subject to a condition of defeasance
if the builder completed the work(8). It was held to be for 35
the purpose of securing to the building owner the due performance
of the work, and that, if the contractor failed to complete, he
could not recover the materials, although the building owner
does not complete the works himself or by another contractor.
The present case is a very much stronger case in that the vesting 40
clause is in stronger terms, and there is the special provision for
determination of the contract.

(6) (1884) 12 Q.B.D. 436, 442.

(8) *Ibid.*, 695.

(7) [1903] 1 Ch. 690.

So far as concerns the deposit of money, plainly the amount deposited was to be held by the Board as security for the due performance of the contract, and I think it is very much in the same position as a deposit paid in the ordinary case of an agreement for the sale and purchase of land. As to the plant, reading 5 cls. XXIII and LI of the general conditions together, the Board in keeping the plant and materials was simply retaining its own property. Assuming that, however, not to be so, the most that can be said, I think, from the plaintiff's point of view is that the 10 plant and materials were in the same position as the deposit-moneys—namely, a security for the due performance of the contract.

In the view that I take of the case, the authorities cited by Mr. *Willis* relating to mortgages and clogging the equity of 15 redemption have no application. Nor do I think that the question whether cl. LI involves a matter of penalty or liquidated damages calls for consideration. If it did, I should certainly be disposed to say that the amount of the deposit plus the value of the plant was a genuine agreed pre-estimate of loss in the event of the 20 contract having to be determined under cl. LI—*Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.* (9)—although, if the question of penalty or liquidated damages did arise, the position might have been different if there had been a forfeiture of the retention-moneys.

25 I cannot see that there is anything illegal or void in the provisions of cl. LI, and I therefore answer the first question in the negative.

If that is correct, then, as I understood counsel to agree at the argument, the second question does not arise. That question is 30 as follows: "Whether the acts and matters set forth or "complained of in the plaintiff's statement of claim were acts "or things done by the defendant Board in pursuance of the "Harbours Act, 1923, and its amendments, within the meaning "of s. 248 of that Act?"

35 I therefore do not answer the question categorically, though I should be disposed to say that if my answer to the first question is right the second question would have to be answered in the affirmative.

I may observe, however, that s. 248 is not nearly so 40 comprehensive in its terms as the corresponding provision in some of our other statutes relating to local authorities—*e.g.*, the Electric-power Boards Act—*Vincent v. Tauranga Electric-power*

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Board(10)—or in the Public Authorities Protection Act, 1893 (Imp.), (13 *Halsbury's Complete Statutes of England*, 455). Section 248 of the Harbours Act, 1923, says that :

No plaintiff shall recover in any action commenced against a Harbour Board or person for anything done *in pursuance of this Act* unless such action is commenced within three months after the act is committed, and unless notice has been given to the defendant one month before such action is commenced . . .

It is true that the defendant Board was not bound to do the work the subject-matter of the present contract, but it has power to construct "harbour works," and s. 126 of the Act requires that every contract shall specify the work to be done or executed, the materials to be furnished, the price to be paid for the same, the time or times within which the work is to be completed, *and the penalties to be suffered in case of non-performance thereof*. By s. 169 the Board had to obtain the sanction of the Governor-General in Council before commencing the work the subject-matter of the contract, and I should be disposed to think that in exercising its remedy of enforcing its remedies under the contract the defendant Board was engaged in a public duty—see *per Lord Shaw of Dunfermline in Bradford Corporation v. Myers*(11), and was doing something in pursuance of the Harbours Act. I am merely expressing my present view as it may perhaps be of assistance to the parties, but as I have already said I do not categorically answer the second question; and, if my answer to the first question had been different, I should have thought it necessary to give more consideration to the second.

Costs of argument, fixed at twenty guineas, to be paid by the plaintiff to the defendant.

First question answered in defendant's favour.

Solicitors for the plaintiff: *Gifford and Robinson* (Napier).

Solicitors for the defendant: *Sainsbury, Logan, and Williams* (Napier).

(10) [1935-36] N.Z.L.G.R. 403.

(11) [1916] 1 A.C. 242, 264.

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O'REGAN, J.

Workers' Compensation—“Arising out of and in the Course of the Employment”—Motorman, having handed over Tram-car to his Successor, continuing in Car for his own Purpose—Accident while attempting to leave Car in Motion—Added Risk not incidental to Employment—Workers' Compensation Act, 1922, s. 3 (1).

A motorman, in the employ of the defendant Corporation, after handing his tram-car over to his successor, before taking charge of another car, continued in the car he had handed over, intending to alight at a stopping-place and make a purchase for purposes of his own. As the car approached the stop, he stood on the rear step and was about to alight, when he slipped, twisted his left knee, and suffered disablement.

Held, That, having been injured while doing something entirely for purposes of his own, and having incurred an added risk not incidental to his employment in attempting to leave a moving car, the injury resulted from an accident that did not arise out of the employment.

Smith v. Thompson and Gwillim(1); *Pike v. Murray*(2); *Reed v. Great Western Railway Co.*(3); *Thomson v. Flemington Coal Co., Ltd.*(4); *Price v. Tredgar Iron and Coal Co., Ltd.*(5); and *Wilson v. London and North Western Railway Co.*(6), applied.

(1) [1917] G.L.R. 346.

(2) [1921] N.Z.L.R. 830; G.L.R. 442.

(3) [1909] A.C. 31; 2 B.W.C.C. 109.

(4) [1911] S.C. (Ct. of Sess.) 823; 4 B.W.C.C. 406.

(5) (1914) 111 L.T. 688; 7 B.W.C.C. 387.

(6) (1918) 87 L.J. K.B. 843; 11 B.W.C.C. 19.

CLAIM for compensation under the Workers' Compensation Act, 1922.

The plaintiff, a motorman in the employ of the defendant Corporation, claimed compensation for seven weeks' disablement, amounting to £25 14s. 9d., alleging that he was injured by accident arising out of and in the course of his employment on Friday, August 19, 1938. On that day he signed on at Kilbirnie at 1.56 p.m., and, having taken his car to Lambton Station, he laid it up in Aitken Street at 2.35 p.m. At 2.48 p.m. he took another car to Karori Park, left there at 3.17 p.m., and was back at the Government Buildings at 3.43 p.m., when he handed his car over to another motorman. He was to take charge of another car at Thorndon at 4.15 p.m. for Newtown Park, and, in fact, he did so, and completed his shift notwithstanding the accident which is the ground of these proceedings. When he handed his car over to his successor at the Government Buildings, instead of leaving the car

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immediately, he sat in the outer compartment, and rode therein as far as the stopping-place in Manners Street near the Cuba Street intersection, his intention being to alight there and make a purchase at a shop for purposes of his own. As the car approached the stop, he stood on the rear step, and was about to alight when he slipped and twisted his left knee, in consequence whereof he suffered the disablement already mentioned. Despite the injury he continued his work, was back at Thorndon to take charge of his car at 4.15 p.m., and he reported the accident on the termination of his shift. He was unable to resume work next day; and it was admitted that, as the result of the injury, he was disabled for seven weeks. 5 10

F. W. Ongley, for the plaintiff.

J. O'Shea and *J. R. Marshall*, for the defendant.

Cur. adv. vult. 15

O'REGAN, J. The plaintiff has given his evidence frankly and fairly, and there is no question of fact in dispute. The question in issue is purely one of law: Did the accident arise out of and occur in the course of the employment?

Mr. O'Shea admits that, had the accident occurred as the plaintiff was leaving the car as it stood where he had handed it over to the succeeding motorman, all the conditions required by the Act would have been satisfied and compensation would be payable. He maintains, however, that at the time and place when the accident occurred there was an interruption of the employment in that plaintiff was doing something for purposes of his own, which, though quite legitimate, was not in any way connected with his employment, and counsel refers us to a number of cases: *Smith v. Thompson and Gwillim*(1), where the plaintiff, a coach-driver, was injured after he had deviated for purposes of his own from the regular route of travel; *Pike v. Murray*(2), where a farm-manager was injured while cutting firewood for his own use; *Reed v. Great Western Railway Co.*(3), in which case a collier was killed by a fall in a part of the mine where his contract of service did not require him to be; and *Thomson v. Flemington Coal Co., Ltd.*(4), where a collier suffered injury while doing something outside the ambit of his contract of service. 20 25 30 35

Mr. Ongley admits the authority of all the cases cited, but argues that the case before us is distinguishable for the reason

(1) [1917] G.L.R. 346.

(2) [1921] N.Z.L.R. 830; G.L.R. 442.

(3) [1909] A.C. 31; 2 B.W.C.C. 109.

(4) [1911] S.C. (Ct. of Sess.) 823; 4 B.W.C.C. 406.

that, as plaintiff had necessarily to leave the car after he had handed it over, even though there was an interruption of the employment during the time occupied in travelling from Government Buildings to the Manners Street stop, yet that interruption
 5 ceased the moment the plaintiff started to alight, and hence that the accident must have arisen out of and have occurred in the course of the employment.

The Workers' Compensation Act ordains that its benefits shall be limited to persons injured by accident arising out of and in the
 10 course of their employment, and the meaning to be given to these words has been considered in a long series of cases. A worker who is injured while doing something—even something he has the right to do—entirely for purposes of his own cannot be said to have been injured by accident arising out of and in the course of his
 15 employment. Thus, in *Price v. Tredegar Iron and Coal Co. Ltd.* (5), a colliery company had contracted with a railway company to provide a free train to take the colliers from the pits to the town of Tredegar. During a journey from work, pursuant to this arrangement, one of the men attempted to alight nearer to his
 20 home as the train was slowing down, his object being to save the necessity of walking back, and in so doing he was killed. The Court of Appeal held that the accident was not within the Act. Again, in *Wilson v. London and North Western Railway Co.* (6) a worker jumped from a train on which he was entitled to travel
 25 before it had stopped, and was killed. Again it was held that the accident did not arise out of or occur in the course of the employment. In each of these cases the deceased had to alight from the train, but he attempted to do so too early and so lost the protection of the Act. Here, the plaintiff left the car after having handed
 30 it over to his successor; he had travelled a considerable distance entirely for his own purposes. Further, there is necessarily greater risk of injury when leaving a moving car than a stationary one, hence we must hold, both on principle and authority, that he is not entitled to succeed. Accordingly, judgment must be for
 35 the defendant Corporation, to whom leave is reserved to apply for costs.

Judgment for defendant Corporation.

Solicitors for the plaintiff: *Ongley, O'Donovan, and Arndt* (Wellington).

Solicitor for the defendant: *J. O'Shea* (Wellington).

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 BLENHEIM,
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 March 7, 10.
 REED, J.

[IN THE SUPREME COURT.]

In re AN ARBITRATION BETWEEN THE
 BLENHEIM BOROUGH CORPORATION AND
 GIBSON.

*Landlord and Tenant—Lease—Renewal—Rent for extended Term—Provision
 that no Borough Rates payable—Whether Rent should be increased by
 Valuers in view thereof.*

A lease was granted by the Corporation to P., for a term of twenty-one years with right of renewal, the rental under any renewed lease to be fixed by a valuation made by three independent persons, one appointed by the Corporation, one by the tenant, and the third by the two appointed valuers. The lease contained the following provision:—

“It is hereby expressly declared that the said land and all buildings hereafter erected upon it shall be free and exempt of all present and future borough rates and that no covenant proviso or other provisions shall be deemed implied herein by statute.”

On a special case stated by the valuers for the decision of the Court,

Held, That the valuers, in fixing the said rent, were entitled to take into consideration the fact that no rates were payable to the borough in respect of the said land, and to increase the rental accordingly.

Drapery and General Importing Co. of New Zealand, Ltd. v. Mayor, &c., of Wellington(1) followed.

(1) (1912) 31 N.Z.L.R. 598; 14 G.L.R. 505.

SPECIAL CASE stated under s. 11 of the Arbitration Amendment Act, 1938, for the decision of the Court on a point of law arising in the course of a reference.

By memorandum of lease the Blenheim Borough Council in 1917 granted a lease of certain borough land to one Parker for a term of twenty-one years with a right of renewal, the rental under any renewed lease to be fixed by a valuation made by three independent persons, one to be appointed by the Corporation, one to be appointed by the tenant, and the third valuer to be appointed by the two valuers appointed as aforesaid. Parker transferred all his right, title, and interest in the lease to the above-named Gibson.

Valuers were appointed, and in the course of the valuation a question of law has arisen owing to an unusual provision in the lease, as follows:—

It is hereby expressly declared that the said land and all buildings hereafter erected upon it shall be free and exempt of all present and future borough rates and that no covenant proviso or other provisions shall be deemed implied herein by statute.

The question for the opinion of the Court was: “Are the valuers entitled in fixing the said rent to take into consideration the fact

"that no rates are payable in respect of the said lands to the
"borough, and to increase the rental accordingly?"

Nathan, for the Corporation.

Wicks, for Gibson.

5

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REED, J. The provision in the lease as to the method of
ascertaining the new rental is in common form, and is as follows:—

3. In ascertaining such new rental the valuers shall not take into con-
sideration the value of any buildings or improvements then existing upon
10 the said demised premises but they shall value the full and improved ground
rental of the said premises that ought to be payable during the said term.

A similar provision received judicial interpretation in the leading
case of *Drapery and General Importing Co. of New Zealand, Ltd.*
v. Mayor, &c., of Wellington(1); it was there decided by the Court
15 of Appeal that "The true basis on which the valuers must proceed
"is that there are no buildings or improvements on the land.
"They must ascertain what a prudent lessee would give for the
"ground-rent of the land for the term, and on the conditions as
"to renewal and other terms, &c., mentioned in the lease"(2).

20 The principle there laid down has been applied in several New
Zealand cases which were cited during the argument. I have
examined them all, but none of them affects the broad principle
laid down in the leading case, that in fixing the rent the inquiry
is as to what a prudent lessee would give as ground-rent based
25 upon a consideration of the term of the lease and all other con-
ditions as to renewal and other terms.

Now it is specially provided in the lease that the new lease
shall be

30 with and subject to the like covenants provisos agreements declarations and
provisions as are contained in this present memorandum of lease including
the present covenant for renewal and all provisions ancillary or in relation
thereto.

One of those conditions is the express declaration of non-liability
for borough rates for all time. There can be no question but that
35 this attaches a special value to the lease, and, in my opinion, is
a consideration that would weigh with a prudent lessee and would
induce him to pay a higher rental than he would pay in the absence
of such a condition. My answer, therefore, to the question asked
is "Yes." During the course of the argument the question was
40 raised as to whether in the event of an affirmative answer it would
mean that in fixing the rent the whole of the amount of rates that

(1) (1912) 31 N.Z.L.R. 598; 14 G.L.R. (2) *Ibid.* 605; 507.
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could be assessed on the property should be added to the amount that would be considered a proper rent in the absence of such a condition. I have not been specifically asked this question and there was no full argument; but, perhaps, it would assist the arbitrators if I were to suggest that the full amount should not be allowed. The whole circumstances should be considered, and a reasonable sum assigned for the increased value attached to the lease by the absence of liability for rates.

5

Question answered accordingly.

Solicitor for the Borough Council: *A. C. Nathan* (Blenheim).
Solicitors for Adam Gibson: *McCallum, Wicks, and Co.*
(Blenheim).

WILSON v. WEBER COUNTY.

Motor-vehicles — Regulations — Heavy-traffic Licenses — Local Authorities — Reduction of Licensing Fees—Ultra vires—Public Works Act, 1928, ss. 166 (2) (c) (d), 173—Heavy Motor-vehicle Regulations, 1932 (1932 New Zealand Gazette, 302), Reg. 10 (6) (7).

As the authority given by s. 166 of the Public Works Act, 1928, to impose heavy-traffic licenses does not impliedly give power by Order in Council to provide either for subsequent reduction or refund of such license fees, and no express power is given to make such provision, cls. 6 and 7 of Reg. 10 of the Heavy Motor-vehicle Regulations, 1932, are *ultra vires*.

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1939.

Feb. 9, 13.

OSTLER, J.

APPEAL on point of law from a decision of a Stipendiary Magistrate sitting at Dannevirke on October 6, 1938.

The appellant was a sawmiller at Halcombe, but he used three heavy motor-vehicles for transporting logs and sawn timber over certain roads in the County of Weber, and in respect of such user has paid to the respondent county certain license fees. These fees were paid quarterly, and for the period from November 30, 1937, to May 31, 1938, amounted to £53 10s. 1d. The user of these motor-vehicles on a road in the county called the Esdale Road caused damage to the surface of that road which the County Council caused to be repaired in March and April, 1938. The Council claimed the cost of such repairs from the appellant, and brought a complaint against him for such cost under s. 173 of the Public Works Act, 1928. On May 19, 1938, the learned Magistrate heard this complaint and gave judgment against the appellant for £50 as the cost of repair of Esdale Road, which sum the appellant duly paid. On July 21, 1938, a written agreement was entered into between the appellant and the respondents under the powers given by the proviso to s. 173 of the Public Works Act, 1928. Under that agreement the appellant agreed to pay to the respondents the sum of 6d. for every hundred superficial feet of timber, either sawn or in logs, carted by him in heavy motor-vehicles over Esdale Road from December 1, 1937, to August 31, 1938. But the agreement made it clear that the payments were to be in addition to the £50 already recovered for extraordinary damage done to the road. Under this agreement the appellant paid to the respondents the sum of £68 10s. 1d. for the period from December 1, 1937, to August 31, 1938. The appellant then claimed from the respondents a refund of the heavy-traffic-license fees he had paid, or alternatively for refund of a part of such fees.

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The claim was made under cls. 6 and 7 of Reg. 10 of the regulations made on February 16, 1932, under the Motor-vehicles Act, 1924 (1932 *New Zealand Gazette*, 302). It was disputed by the respondents upon the ground that these subclauses were *ultra vires*, and the learned Magistrate upheld that contention. This appeal was from his decision, and the case turned upon whether the subclauses relied on were *ultra vires*. 5

Lyon, for the appellant.

T. H. G. Lloyd, for the respondent.

Cur. adv. vult. 10

OSTLER, J. [After stating the facts, as above :] The principles upon which the Court determines the validity of regulations made by Order in Council are well settled. It merely construes the Act under which the regulations purport to have been made. Then it looks at the regulations in order to see if they are within the object and intention of the Act. If not, however reasonable they may appear, or however necessary they may be considered, they are *ultra vires* and void. 15

Clauses 6 and 7 of Reg. 10 of the regulations purport to have been made under the authority of the Public Works Act, 1928, and the Motor-vehicles Act, 1924. But it is only under the former Act that heavy-traffic licenses are authorized to be imposed by Order in Council, and therefore it is to that Act that one must look to ascertain whether power has been given to make this regulation. Section 166 (2) (c) and (d) are the only provisions which I can find in the Public Works Act, 1928, empowering the Governor-General in Council to issue heavy-traffic licenses. They provide that the Governor-General may by Order in Council make regulations providing for the issue of heavy-traffic licenses and fixing the license fee payable for such licenses by reference to weight, carrying-capacity, and the kind of tires used 20 25 30

but so that the minimum fee in respect of any vehicle shall be not less than five pounds, and the maximum fee shall be not more than seventy-five pounds.

Section 173 of the Act is as follows :—

Where it appears to the local authority which is liable or has undertaken to repair any road, whether a main road or not, that extraordinary expenses have been or will have to be incurred by such authority in repairing such road by reason of the damage caused by excessive weight passing along the same or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order or for whose benefit such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case have been or will have to be incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid : 35 40 45

Provided that any person against whom expenses are or may be recoverable under this section may enter into an agreement with such authority as is mentioned in this section for the payment to it of a composition in respect of such weight or traffic, and thereupon the persons so paying

5 the same shall not be subject to any proceedings under this section.

Clause 6 of Reg. 10 of the regulations provides that :

Where by virtue of any agreement for composition made in pursuance of s. 173 of the Public Works Act, 1928, any sum is payable in respect of any particular heavy motor-vehicle, then the license fee imposed by these

10 regulations in respect of such heavy motor-vehicle shall be reduced by the sum so paid during the then current license quarter in respect of the said heavy motor-vehicle: Provided that evidence shall be produced to the licensing authority at the time of payment of the license fee of the fact that such sum has been so paid.

15 Clause 7 of Reg. 10 provides that :

Where, in respect of the use of any particular heavy motor-vehicle, extraordinary expenses that have been incurred by a local authority have been recovered in a summary manner in pursuance of s. 173 of the Public Works Act, 1928, and have been actually received by the local authority,

20 a refund shall be paid to the owner of that heavy motor-vehicle from the license fee paid by him for such heavy motor-vehicle equal to the amount of such expenses recovered in respect of the period for which such license fee was paid.

In my opinion, the power given by s. 166 to provide for the

25 issue of heavy-traffic licenses and fixing the license fees does not authorize the Governor-General in Council to provide either for a subsequent reduction or a refund of those fees by a local authority to whom they have been paid. The provisions of cls. 6 and 7 of Reg. 10 are really independent legislation by Order in

30 Council which is not only not authorized but is actually repugnant to the provisions of s. 173. That section provides, first, that if extraordinary expenses have been incurred by local authorities in repairing one of its roads by reason of damage caused by extraordinary traffic thereon, the local authority may recover

35 those expenses in summary manner from the person responsible for the extraordinary traffic. There is, however, a proviso to the section that any person against whom the expenses may be recoverable under the sections may enter into an agreement for the payment of it and a composition in respect of such traffic,

40 "and thereupon the person so paying shall not be subject to any "proceedings under this section."

Parliament has therefore provided that if such person enters into a composition under the proviso he cannot be sued under the first part of the section. Clause 6 of Reg. 10 of the regulations

45 goes much further than Parliament in the matter. It provides that when a composition is paid the license fees shall be reduced. As I have said, there is absolutely no power given by the Act to impose such a reduction on local authorities. Nor is there any

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power to impose a refund on the local authority when it has recovered extraordinary expenses under the main part of s. 173.

The learned Magistrate has held that these two clauses in question are *ultra vires* because they are unreasonable. I express no opinion on that ground. If clearly authorized by the Act under which they purport to be made, in my opinion they would be valid even though unreasonable. I decide this case entirely on the ground that the authority to impose heavy-traffic licenses does not impliedly give power by Order in Council to provide either for subsequent reduction or refund of such license fees, and no express power is given to make such provision. That being so, in my opinion the learned Magistrate was right in holding that these two clauses were *ultra vires*. The appeal will accordingly be dismissed with costs, £7 7s. 5 10

Appeal dismissed.

Solicitor for the appellant: *W. A. Lyon* (Woodville).

Solicitors for the respondents: *Lloyd and Lloyd* (Dannevirke).

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 DEFENDANT
 AND
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 INFORMANT.

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Feb. 14;
 May 15.

MYERS, C.J.

By-law—Building Licensed as a Public Hall—Licensee prohibited from Bringing in or permitting the Bringing-in of Intoxicating Liquor—"During any function therein of which dancing forms a part"—Unreasonableness—Uncertainty—Invalidity—Repugnancy to General Law—Municipal Corporations Act, 1933, ss. 312, 364, 367.

The Dunedin City By-law, No. 23 of 1931, contained the following provisions:—

"20. (i.) No person being the licensee of any building licensed as a public hall shall bring or permit or suffer to be brought into such building any intoxicating liquor for use at or during any function therein, of which dancing forms a part; nor shall any such person permit or suffer any intoxicating liquor to be or remain in such building during any such function. For the purposes of this clause, the expression 'licensee of any building' shall mean and include the person named and described as the licensee in the license for the said building and any person or persons or body corporate for the time being entitled to the use and occupation thereof under or by virtue of any contract with the person so named and described in the license for the said building.

"(ii.) No person shall bring any intoxicating liquor into any building licensed as a public hall during any function of which dancing forms a part, nor shall he have any intoxicating liquor in his possession in any such building during any such function:

"Provided, however, that it shall be competent for the Council under the hand of the Town Clerk to grant permission for the use of intoxicating liquor at any such function on condition that the distribution of such liquor is strictly under the personal control of the licensee as hereinbefore defined"

On appeal from a conviction by a Stipendiary Magistrate for breach of such by-law, in that, being the licensee of a building licensed as a public hall in the City of Dunedin, the appellant permitted to be brought into such building intoxicating liquor for use at or during a function of which dancing formed a part without permission in writing under the hand of the Town Clerk,

Held, allowing the appeal, 1. That, for the reasons given in the judgment, the by-law was unreasonable, and, consequently, invalid.

McCarthy v. Madden(1); *Scott v. Pilliner*(2); and *Miller v. City of Brighton*(3), applied.

White v. Morley(4) and *Kruse v. Johnson*(5) referred to.

2. That the proviso at the end of the by-law reserving power to the Council to grant permission for the use of intoxicating liquor at any particular function could not make the by-law valid, if it were otherwise invalid.

Waite v. Garston Local Board of Health(6) followed.

(1) (1914) 33 N.Z.L.R. 1251; 17 G.L.R. 61.

(2) [1904] 2 K.B. 855.

(3) [1938] V.L.R. 375.

(4) [1899] 2 Q.B. 34, 39.

(5) [1898] 2 Q.B. 91.

(6) (1867) L.R. 3 Q.B. 5.

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Held also, That, in view of the words, "function of which dancing forms a part," and their general application to any building licensed as a public hall under s. 312 of the Municipal Corporations Act, 1933, the by-law was repugnant to the provisions of that statute and to the general law, alternatively, the meaning of those words was vague and uncertain; and consequently the by-law was invalid on either of those grounds.

APPEAL from the conviction by a Stipendiary Magistrate of the licensee of a building licensed as a public hall for a breach of cl. 20 of the Dunedin City By-law No. 23/1931, which was as follows:—

20. (i.) No person being the licensee of any building licensed as a public hall shall bring or permit or suffer to be brought into such building any intoxicating liquor for use at or during any function therein, of which dancing forms a part; nor shall any such person permit or suffer any intoxicating liquor to be or remain in such building during any such function. For the purposes of this clause, the expression "licensee of any building" shall mean and include the person named and described as the licensee in the license for the said building and any person or persons or body corporate for the time being entitled to the use and occupation thereof under or by virtue of any contract with the person so named and described in the license for the said building. 5 10

(ii.) No person shall bring any intoxicating liquor into any building licensed as a public hall during any function of which dancing forms a part, nor shall he have any intoxicating liquor in his possession in any such building during any such function: 15

Provided, however, that it shall be competent for the Council under the hand of the Town Clerk to grant permission for the use of intoxicating liquor at any such function on condition that the distribution of such liquor is strictly under the personal control of the licensee as hereinbefore defined. . . . 20

The appellant was charged with an offence against this by-law, the information alleging that, being the licensee of a building licensed as a public hall in the City of Dunedin and known as the "Peter Pan Cabaret," he did on September 24, 1938, permit to be brought into such building intoxicating liquor for use at or during a function of which dancing formed a part without permission in writing under the hand of the Town Clerk. It is from a conviction by the Magistrate on that information that this appeal was brought. 25 30

P. S. Anderson, for the appellant.

Haggitt, for the respondent.

Cur. adv. vult. 35

MYERS, C.J. [After stating the facts, as above:] The fate of the appeal depends upon the validity or invalidity of the by-law. It is unnecessary for me to repeat the facts which appear fully in the case stated by the Magistrate.

At the time when the by-law was made the Municipal Corporations Act, 1920, was in force. That Act has been repealed and 40

superseded by the Municipal Corporations Act, 1933. The relevant provisions are the same in both Acts, and I propose, therefore, to refer to the sections of the later statute which is now in force.

The matter is provided for in a special Part of the Act (now 5 Part XXV) and the Twelfth Schedule. The title of Part XXV is "Buildings for Public Meetings, &c.," and the Twelfth Schedule is headed "Conditions for use of Buildings for Public Meetings, &c." The word "use" is probably not without significance. Section 312—Part XXV begins with s. 311—enacts:

- 10 It shall not be lawful to use any building within a borough for public meetings, or as assembly-rooms, or as a theatre or music-hall or dancing-hall, or as a stand on any racecourse, sports-ground, or show-ground, or for any public performances or public amusements whatever, whether a charge is made for admission thereto or not, unless and until such building is licensed in accordance with the provisions contained in the Twelfth Schedule hereto.
- 15

Section 311 defines "building" as including any part of a building or any enclosure, ground, or premises whatsoever.

- The Twelfth Schedule (for which see now the Municipal Corporations Amendment Act, 1938) requires the owner or occupier 20 of a building to apply in writing to the Council for a license stating, *inter alia*, the purpose for which the building is to be used. It also provides for inspection by the Surveyor or some competent person appointed by the Council in that behalf, and cl. 2 of the Schedule provides that if satisfied upon his report that such build- 25 ing is secure and suitable for the purpose proposed; that it has sufficient means of ventilation and of ingress and egress; that sufficient sanitary conveniences are provided for the use of the public; that sufficient provision is made against fire; and, in case the neighbourhood of such building is supplied with water by means 30 of waterworks, that a sufficient supply of water is laid on, and proper appliances provided for promptly using the same in case of fire—the Council *shall* issue to the applicant a license, under the hand of the Town Clerk, for a period not exceeding one year, to use the said building for the purpose stated in the application, 35 and such building may be used accordingly. Clause 3 provides that the Council may attach to the license any conditions as to the provision at public entertainments, by and at the cost of the licensee, of duly qualified firemen, and the use in the building of any means of producing light or heat, or otherwise for the safety of 40 persons assembled in the building, and may refuse to issue any license until the fee thereon fixed by any by-law is duly paid. Clauses 4 and 5 provide for an appeal by the applicant if he feels aggrieved at not obtaining the license or at any condition attached to the license.

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Section 318 empowers the Council (a) to refuse to grant a license to use a building for any of the purposes mentioned in s. 312 to any person if it is satisfied that he is not a person of good character and reputation ; and (b) to suspend or cancel a license, either wholly or for such period as it thinks fit, if satisfied that the licensee has since the granting of the license become of bad character and reputation or otherwise not a fit and proper person to hold such a license. The section further provides that before refusing a license the Council shall give the applicant an opportunity to be heard before a Committee of the Council, and further confers a right of appeal upon the person aggrieved at the refusal of the Council to grant a license or upon a licensee aggrieved at the cancellation or suspension of his license. 5

Section 316 (1) enacts, *inter alia*, that subject to a similar right of appeal by the licensee the Council, upon being satisfied that any licensed building is being used in a disorderly manner so as to be obnoxious to the neighbouring inhabitants or to the public, may cancel or suspend the license either wholly or for such period as it thinks fit. 15

The power of making by-laws under the Act is contained in s. 364, and is very wide. It enables the Council to make such by-laws as it thinks fit for all or any of the purposes enumerated in no fewer than forty-three paragraphs, and the particular purposes upon which the Corporation relies here are— 20

- (1) The good rule and government of the borough : 25
- (2) The more effectual carrying-out of any of the objects of this Act :
- (3) Regulating any of the subject-matters of this Act :
- (4) Regulating, controlling, or prohibiting any act, matter, or thing usually the subject of municipal regulation, control, or prohibition : . . . and 30
- (8) Conserving public health, safety, and convenience, and preventing and abating nuisances. 30

Section 367 (h) enacts that a by-law shall not be deemed invalid merely because it deals with a subject dealt with by the general law, while, on the other hand, s. 368 enacts that the powers of making and enforcing by-laws shall be subject to various limitations and provisions. *Inter alia*, 35

(a) A by-law shall not be valid if manifestly repugnant to the laws of New Zealand or the provisions of this Act : . . .

(d) No by-law shall be valid if a breach thereof would involve a breach only of some religious or moral rule. 40

It is contended on behalf of the appellant that those paragraphs of s. 364 to which I have referred do not—and it is not suggested on behalf of the Corporation that there is any other paragraph which does—warrant the making of a by-law dealing with the 45

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question of, or at all events prohibiting, the consumption or use of intoxicating liquor in a public hall licensed under s. 312. True By-law No. 23/1931 purports to prohibit only when the building (which may be licensed generally for all the purposes mentioned in s. 312) is being used for a "function therein of which dancing forms a part." (The building licensed in this case is not described in the license as a "dancing-hall"; it is expressed to be licensed "to be used as and for dances, &c.") The by-law is not restricted to a building licensed as a "dancing-hall," and the suggestion is that if the Council has power to prohibit the consumption or use of liquor in a building licensed merely as a "dancing-hall," it must have the same power of prohibition in respect of any "building" licensed for any of the purposes mentioned in s. 312. It is contended for the appellant that as to para. 1 of s. 364 the power thereby conferred does not extend beyond the streets of the borough: that paras. 2 and 3 can refer only, so far as buildings under s. 312 are concerned, to the structural, health, and sanitation aspects thereof; that, so far as para. 4 is concerned, the consumption or use of liquor is not a "matter or thing usually the subject of municipal regulation, control, or prohibition"; and that as to para. 8 the mere consumption or use of liquor in reasonable quantities does not create a nuisance and cannot be made the subject of a by-law under the particular paragraph. It is contended that power to legislate locally for the total prohibition of harmless conduct which is not *per se* a nuisance or harmful to the citizens should not be readily inferred and should be required to be conferred by statute in plain terms if it is the intention of Parliament to confer such power. It is suggested that a by-law such as the one now under consideration approaches a regulation of moral conduct or the provision of a moral code that should not be the subject-matter of a by-law.

Express power is conferred upon the Council by para. 18 of s. 364 to regulate the use "of any public building or public place vested in the Corporation or under the control of the Council," and it may be that in respect of the use of any such public building the Council may make by-laws regulating the consumption or use of liquor therein, but it may well be that in respect of buildings coming within the provisions of Part XXV of the Act, those provisions, including, of course, the Twelfth Schedule (except to the extent to which additional powers may be expressly conferred by s. 364), constitute a complete code. Clause 3 of the Schedule impliedly empowers the Council to make a by-law imposing a license fee, and ss. 318 (1) (b) and 316 enable the Council to suspend

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or cancel a license if the licensee has become of bad character and reputation or otherwise not a fit and proper person to hold such a license, or if the licensed building is used in a disorderly manner so as to be obnoxious to the neighbouring inhabitants or to the public. Section 364 deals with a great many subject-matters. 5

Inter alia, there is provision in para. 9 for licensing and regulating vehicles; in para. 18, as I have already stated, for regulating the use of any reserve, cemetery, recreation-ground or other land, and any public building or public place vested in the Corporation or under the control of the Council; in para. 25 for defining, 10

licensing, and controlling common lodginghouses and billiard-rooms and public baths; in para. 26 for licensing, inspecting, and regulating boardinghouses; and in para. 38 for licensing sports-grounds or other lands (whether privately owned or not) on which large numbers of persons are likely to assemble, and for requiring 15

sufficient modes of ingress thereto and egress therefrom to be provided and maintained, and for preserving good order therein. Could it be suggested that the power to control common lodging-houses or the power to regulate boardinghouses could warrant the making of a by-law prohibiting the consumption or possession 20

therein of intoxicating liquor? Or could it be suggested that a by-law purporting to prohibit persons from drinking, or carrying, intoxicating liquor on any street in a borough could be justified under all or any of paras. 1, 2, 3, 4, and 8 of s. 364 of the Act? Be that as it may, there is not in s. 364 a word of express reference 25

to the use of buildings licensed under Part XXV of the Act, and the reason for the omission may well be that Part XXV (except for the addition of any powers that might be expressly conferred by s. 364) is a code in itself and gives all the necessary power to prevent a building licensed thereunder from being used in a disorderly manner 30

or so as to constitute a nuisance. I do not, however, decide the case on that ground. It is better, I think, to leave that question open at present. No doubt a Municipal Corporation which makes a by-law such as the one now in question does so with the best of intentions, but it is difficult to suppose that the mischief, if mischief 35

there be, is inherently different in its nature or potentialities in different boroughs. If that is so, and if it is considered that there is a mischief which requires to be remedied, it is perhaps not out of place to suggest that the remedy should be uniform throughout the country and that the matter is one that should be dealt with 40

by general legislation. Furthermore, I hope that it is not out of place to suggest that the tendency of a by-law like that under consideration if it be valid is to create a much greater evil than the

one which it seeks to remedy, inasmuch as the tendency, I should think, would inevitably be to encourage persons who wish to consume intoxicating liquor, if they are not permitted to consume it in reasonable quantities in the building under some measure of control, to keep and consume it without any kind of control and perhaps in excessive quantities in motor-cars parked in the streets or other parking-places.

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Assuming, however, that there is power for the Council to make a by-law regulating the use of intoxicating liquor in a hall licensed under s. 312, there are other grounds upon which, I think, the appeal must succeed. It is true that ever since the decision in *Kruse v. Johnson*(1) the Courts have endeavoured to interpret the by-laws of a local body benevolently, and to support them if possible. Nevertheless, if a by-law is plainly unreasonable, it cannot be supported and must be held to be invalid, and that, in my opinion, is the position in this case. The general principles applicable are stated in *McCarthy v. Madden*(2) in the judgment of *Denniston* and *Edwards*, JJ.(3); and it must be remembered that, in so far as the by-law under discussion in this case purports to lay down a general prohibition, it affects a liberty common to all the King's subjects. The question must be dealt with on broad grounds: *Scott v. Pilliner*, per *Kennedy*, J.(4). It is desirable for the good government of a locality that by-laws should be clear and definite and free from ambiguity, and also that such by-laws should not make unlawful things which are otherwise innocent: per *Lord Alverstone*, C.J.(5). A by-law is not bad because it deals with something that is not dealt with by the general law, but it must not alter the general law by making that lawful which the general law makes unlawful, or that unlawful which the general law makes lawful: *White v. Morley*, per *Channell*, J.(6). Section 367 of the Municipal Corporations Act provides that a by-law may leave any matter or thing to be determined, applied, dispensed with, prohibited, or regulated by the Council from time to time by resolution, either generally or for any classes of case, or in any particular case; but the proviso at the end of the by-law here reserving power to the Council to grant permission for the use of intoxicating liquor at any particular function cannot make the by-law valid if it is otherwise invalid: *Waite v. Garston Local Board of Health*(7). The only other case I propose to cite is *Miller v. City of Brighton*(8), where it is said: "The municipal

(1) [1898] 2 Q.B. 91.

(2) (1914) 33 N.Z.L.R. 1251; 17 G.L.R. 61.

(3) *Ibid.*, 1268, 1269; 71, 72.

(4) [1904] 2 K.B. 855, 858.

(5) *Ibid.*, 858.

(6) [1899] 2 Q.B. 34, 39.

(7) (1867) L.R. 3 Q.B. 5.

(8) [1928] V.L.R. 375.

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"legislature cannot, under the guise of either prohibitory or regulatory legislation, give either to itself, or to any person or persons, full executive control over the conduct of citizens in relation to matters in which freedom is still unfettered by positive law" (9).

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Section 312 of the Municipal Corporations Act aims to prevent the use without a license of a building for any of the purposes therein mentioned (including that of a "dancing-hall") for any public performance or public amusements whatever. The by-law, however, goes a long way further, and if valid would seem to me to operate in respect of any building licensed under s. 312. That is to say, once the building is licensed, no matter for what purpose it is being used for the time being, the by-law operates. The prohibition against intoxicating liquor applies to dancers and non-dancers alike. The function may be a mere exhibition of dancing followed by a supper. The dancing may be confined to one or two persons giving an exhibition on a platform, all the rest of the persons in the hall being spectators who are there merely to see the exhibition and partake of the supper later. Yet, as dancing forms a part of the function, the prohibition against the consumption and possession of liquor applies to every person in the hall. Not only that, but the licensee must not permit or suffer any intoxicating liquor to be or remain in the building during the function. What is the licensee to do? Is he to search the overcoat pockets of every person who enters the hall to see that no liquor is being carried? Is he to search the hip pocket of every man who enters the hall to see that such man is not carrying a flask? But that is not all. The term "building" under s. 311 of the Act, as previously stated, includes any part of the building, or any enclosure, ground, or premises whatsoever. The by-law, therefore, would appear to prevent the licensee from having any liquor in the building or within the curtilage during any function of which dancing forms a part, even though such liquor is kept secure under lock and key. Furthermore, the by-law would seem to prohibit even a small quantity of spirits being allowed to be or remain in the building or within the curtilage merely as a restorative for use in the event of an accident or the sudden illness of any person who might be in the hall. I think that, if the by-law went no further than that, it would be clearly unreasonable. But in fact it does seem to go a great deal further. Suppose a parent, whose daughter was being married, hired the hall for the purpose of an afternoon or evening wedding reception.

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He thereupon becomes entitled to the use and occupation of the hall under his contract with the actual licensee and becomes under the by-law the "licensee" of the building for the time being. He must under the by-law, so it seems to me, either forbid his guests to dance, or, if he allows it, he is prohibited from entertaining them (whether dancers or not) with any alcoholic liquor. I appreciate that this could never have been contemplated by the Legislature when enacting the Municipal Corporations Act. What it no doubt had in mind was only the use of a licensed hall for the purposes of public entertainment. But, as I have said, the by-law seems to me to go a great deal further and make the prohibition of liquor apply to the licensed building as such while any function is taking place therein of which dancing forms part. It applies to any building licensed as a public hall under s. 312, and not merely to a "dancing-hall." It therefore applies to a theatre or music-hall, and consequently purports to prohibit the consumption or possession of liquor in the precincts of a theatre or music-hall "during a function of which dancing forms a part." It would presumably follow that a turn consisting of artistic dancing at a vaudeville entertainment in a theatre or music-hall would render the consumption or possession of liquor in the theatre or music-hall an offence against the by-law. I cannot think that such a by-law can possibly be held to be anything but unreasonable. More than that, if I am right in my view of what is meant by "function of which dancing forms a part," and as to the consequences generally that would follow from the by-law upon its true construction, it would seem to me that the by-law is not only not warranted by the statute, but is, indeed, repugnant to its provisions and to the general law. If I am not right in my interpretation of the words "function of which dancing forms a part," then the alternative, I think, is that the meaning is vague and uncertain; and, if the by-law is not certain in its terms, it would be invalid on that ground.

The conviction, in my view, is wrong, and must be set aside.
Appeal allowed and conviction quashed accordingly.

Appeal allowed and conviction quashed.

Solicitors for the appellant: *Brent and Anderson* (Dunedin).

Solicitors for the respondent: *Ramsay and Haggitt* (Dunedin).

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[IN THE COURT OF APPEAL.]

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WELLINGTON HARBOUR BOARD APPELLANT
DEFENDANTMarch 16 ;
April 27.

AND

MYERS, C.J.
OSTLER, J.
SMITH, J.
FAIR, J.STANDEN - - - - - RESPONDENT
PLAINTIFF.*Harbours—Statutory Limitation of Time for Bringing Action—Worker's Action for Damages for Injuries—Whether One Month's Notice necessary—"Worker"—Harbours Act, 1923, s. 248 (1)—Statutes Amendment Act, 1936, s. 31.*

The proviso in s. 31 of the Statutes Amendment Act, 1936, merely enlarges the limitation of time for the commencement of the actions referred to from three to six months, and does not repeal the requirement of notice of intended action specified in s. 248 (1) of the Harbours Act, 1923.

Semble, The words in the said s. 31 "any worker in the course of "his employment" are not confined to employees of Harbour Boards.

R. v. Dibdin(1) applied.

Izzard v. Universal Insurance Co., Ltd.(2), mentioned.

So held by the Court of Appeal, reversing the judgment of *Reed, J.*, [1937-38] N.Z.L.G.R. 403.

(1) [1910] P. 57.

(2) [1937] A.C. 773 ; [1937] 3 All E.R. 79.

APPEAL from the decision of *Reed, J.*, reported [1937-38] N.Z.L.G.R. 403, where the facts sufficiently appear, on questions of law argued by consent before the trial of an action.

J. F. B. Stevenson, for the appellant.

Hardie Boys and Wild, for the respondent.

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Stevenson, for the appellant. The only question for the Court is the construction of s. 248 of the Harbours Act, 1923, as amended by s. 31 of the Statutes Amendment Act, 1936. Notice of action was necessary under the Harbours Act, 1923, s. 248, which is analogous to provisions contained in other statutes affording 10 protection to local authorities and persons having statutory duties to perform: under all other local-body statutes, notice of action has to be given by an injured worker—*e.g.*, Municipal Corporations Act, 1933, s. 361, and Electric-power Boards Act, 1925, s. 127. Even in a statute which was passed for the benefit of the worker 15 entirely—Workers' Compensation Act, 1922—ss. 26 and 27 require notice "as soon as possible after the accident," and action to be

brought within six months; and see the Crown Suits Act, 1908, s. 26. The policy of these sections is to prevent belated and unfounded actions, and to give local authorities an opportunity of tendering amends so as to save public money: *Tulloch v. Wellington Harbour Board*(1); *Bradford Corporation v. Myers*(2); and *Vincent v. Tauranga Electric-power Board*(3). It is more necessary for a Harbour Board than it is for other local bodies to have a month's notice owing to the number of accidents that occur on wharves and the difficulty of investigating accidents.

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- 10 Before amendment, s. 248 laid down two conditions precedent before an action could be commenced: commencement of action within three months, and notice of intended action within one month; and subs. 5 referred to "the respective limits of time." The object of the amendment was to enlarge the former time
- 15 within which an action for damages could be brought from three months to six months, so as to give longer time at the end, which is only one of the conditions precedent to action; the other condition precedent as to notice of action is left unaffected. The amendment refers to "limitation of time," otherwise the words
- 20 used would have been those in subs. 5. The language of the proviso does not deal with the notice requirement, and the new limitation of time is only in respect of the commencement of actions. There are several provisions prescribed in s. 248 and it would have been grammatically wrong to have used the word "provision" in the
- 25 singular. The proviso is not in itself an independent enacting clause; it must be construed in the light of its dependency on and derivation of meaning from the section to which it is appended: *Craies on Statute Law*, 4th Ed. 196; *Beal's Cardinal Rules of Legal Interpretation*, 3rd Ed. 302; *Maxwell on the Interpretation of Statutes*, 8th Ed. 139; and *R. v. Dibdin*(4).
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The words "in any such action" in s. 248 (2) include an action brought under the proviso, as well as under the subsection before it was amended. The words, "the respective limits of time "prescribed by subsection one hereof," refer to time within which

35 such action must be brought, and time within which notice must be given; and when the section is referred to, such reference includes the proviso.

The words "suffered by any worker in the course of his "employment," refer to the employee of a Harbour Board, as it

(1) (1903) 23 N.Z.L.R. 20, 24; (3) [1933] N.Z.L.R. 902, 927;

5 G.L.R. 414, 415.
(2) [1916] 1 A.C. 242, 260.

G.L.R. 614, 624; on app.
[1937-38] N.Z.L.G.R. 403 (J.C.).

(4) [1910] P. 57, 125; aff. on app.
[1912] A.C. 533, 540.

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appears in a Harbour Board's statute : where the word " worker " is used in other statutes, it refers to the person in the relationship of a servant to a master : see Industrial Conciliation and Arbitration Act, 1925, s. 2 ; Workers' Compensation Act, 1922, s. 2 ; and Municipal Corporations Act, 1933, s. 361 (8).

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Hardie Boys, for the respondent. The words of s. 31 of the Statutes Amendment Act, 1936, are clear in their meaning, and though in form the amendment is framed as a proviso, it is in fact a substantive enactment, adding to and not merely qualifying what precedes : *Craies on Statute Law*, 4th Ed. 197, and *Rhondda Urban District Council v. Taff Vale Railway Co.*(5). Whatever may be the effect of the words in the amending section down to the words " in the course of his employment," the concluding sentence is an enacting provision : its meaning is clear and the section must be interpreted accordingly : *Reg. v. Titterton*(6). 15
As to the effect of an enabling statute, such as this, see *Craies on Statute Law*, 4th Ed. 229.

If the meaning is not clear, it is not for the Court to supply omissions and every word must be given a meaning : *Craies on Statute Law*, 4th Ed. 100, and *Underhill v. Longridge*(7). The 20 words " at any time " must be given their ordinary meaning, without any qualification as to notice : *Lysons v. Andrew Knowles and Sons, Ltd.*(8).

Section 31 of the Amendment Act provides a complete code in itself to regulate workers' actions : *Bank of England v. Vagliano Brothers*(8A) : the words in s. 248 (2) and (5) of the Harbours Act, 1923 (" respective limits of time "), confirm respondent's argument as to the meaning of the words in the Amendment Act, which are strong as an independent enacting provision : *R. v. Dibdin*(9). *Bradford Corporation v. Myers*(10) is distinguishable. The 30 amendment applies to both limitations of time : *Izzard v. Universal Insurance Co., Ltd.*(11). As to the use of the term " worker," if the Legislature had intended only a person employed by a Harbour Board, the word " servant " would have been used, or " or in the employment of a Harbour Board " would have been 35 added : it includes any worker on a wharf.

Alternatively, the provisions of s. 248 (1) of the Harbours Act, as affecting workers' actions, are repealed by implication : *Craies on Statute Law*, 4th Ed. 310, and *Goodwin v. Phillips*(12).

(5) [1909] A.C. 253, 258.

(6) [1895] 2 Q.B. 61, 67.

(7) (1859) 29 L.J.M.C. 65.

(8) [1901] A.C. 79, 85.

(8A) [1891] A.C. 107, 145.

(9) [1910] P. 57, 125.

(10) [1916] 1 A.C. 242, 250.

(11) [1937] A.C. 773 ; [1937] 3 All E.R. 79.

(12) (1908) 7 C.L.R. 1, 7, 16..

Wild, in support. Alternatively, if the meaning of the amendment is not clear, the principles of construction should be applied: *Heydon's Case*(13) and *Craies on Statute Law*, 4th Ed. 93. The mischief was that the requirements of workers to bring actions
 5 for personal injuries were unduly restricted. The Legislature wanted to enlarge the period from three months to six months, and to abolish the need for notice; and so to extend the rights of workers in actions for damages.

Each statute must be construed separately. As to the danger
 10 of construing one statute by reference to other statutes, see *Smith v. Bailey*(14). There is no provision for tender of amends in the Electric-power Boards Act, 1925, s. 127; no notice to commence an action is required under the Workers' Compensation Act, 1922,
 ss. 26, 27, and no provision is made for tender, and s. 27 (4) makes
 15 provision for bringing an action out of time. Under the Municipal Corporations Act, 1933, s. 361 (8), the Court may waive compliance with the requirements as to notice and commencement of action; and see the Counties Act, 1927, s. 14.

Section 31 of the Statutes Amendment Act, 1938, was passed
 20 to remedy the omission in the Harbours Act. In the actual language of the proviso there is no ambiguity: *Reg. v. Titterton*(15); and see *Vincent v. Tauranga Electric-power Board*(16).

Stevenson, in reply.

Cur. adv. vult.

25 The judgment of MYERS, C.J., OSTLER, J., and SMITH, J., was delivered by

OSTLER, J. This is an appeal from a decision of *Reed*, J.(1), on questions of law argued by consent before trial of an action. The facts are simple, and the questions of law in a narrow compass.
 30 On January 27, 1938, respondent, a wharf-labourer, while working in the hold of a steamship was accidentally injured. On July 26, 1938, he commenced an action for damages against the appellant Harbour Board and the company owning the steamship, alleging that his injuries were caused through the negligence of servants
 35 of the appellant Board and of the steamship company. The respondent did not give to the appellant Board any notice of his intention to bring his action until July 21, 1938, only five days before the issue of the writ. The appellant Board contended that

(13) (1584) 3 Co. Rep. 7a; 76 E.R. 637.

(14) [1891] 2 Q.B. 403, 406.

(15) [1898] 2 Q.B. 61, 65, 67.

(16) [1935-36] N.Z.L.G.R. 403, 406 (J.C.).

(1) [1937-38] N.Z.L.G.R. 227.

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the action was barred by reason of the respondent's failure to give one month's notice of his intention to bring his action. This question depends upon the proper construction of s. 248 of the Harbours Act, 1923, as amended by s. 31 of the Statutes Amendment Act, 1936. Two questions of law were argued. The first 5 was whether the effect of the latter provision, with regard to any worker suffering an injury in the course of his employment, was impliedly to repeal the provisions as to one month's notice contained in the former section. The learned Judge held that the latter provision did effect such an implied repeal. The second 10 question was whether the word "worker" in the latter provision was restricted to a worker in the employment of a Harbour Board. It was held that the word was not so restricted.

With regard to the first point, we think it will assist in the construction of these two provisions to set out s. 248 of the Harbours 15 Act, 1923, with the amendment effected by s. 31 of the Statutes Amendment Act, 1936, incorporated in its proper place as a proviso to subs. 1 of s. 248. When so combined, the provisions read as follows :—

(1) No plaintiff shall recover in any action commenced against a Harbour 20 Board or person for anything done in pursuance of this Act unless such action is commenced within three months after the act is committed, and unless notice has been given to the defendant one month before such action is commenced of such intended action, signed by the plaintiff or his solicitor, specifying the cause of such action : 25

Provided that the limitation of time for the commencement of actions, prescribed by the foregoing provisions of this section, shall not apply with respect to any action for damages in respect of an injury suffered by any worker in the course of his employment, and any such action may be brought 30 at any time within six months after the cause of action arose.

(This proviso is the amendment made by s. 31 of the Statutes Amendment Act, 1936.)

(2) The plaintiff shall not recover in any such action if tender of sufficient amends has been made to him or his solicitor by or on behalf of the defendant before such action is brought. 35

(3) In case no such tender is made, the defendant may, in accordance with the rules of the Court in which the action is brought, pay into Court such sum of money as he thinks proper.

(4) The defendant may plead the general issue, and give the special matter in evidence, and that the same was done in pursuance and under the 40 authority of this Act.

(5) If the same appears to have been so done, or if the respective limits of time prescribed by subsection one hereof are not duly observed, or if the action is commenced after sufficient satisfaction has been made or tendered as aforesaid, then and in every such case the verdict or judgment shall be 45 for the defendant.

It is first to be observed that the amending proviso is not a proviso to the whole section, but merely to subs. 1. The other subsections are not referred to in the amendment. Subsection 1,

first, prescribes a limitation of time (three months) for the bringing of the action, and, secondly, it prescribes a condition precedent—*viz.*, the giving of one month's written notice. That condition precedent is referred to in the section itself as a limit of time, for
5 subs. 5 provides that

if the respective limits of time prescribed by subsection one are not duly observed, . . . judgment shall be for the defendant.

The Legislature itself has therefore recognized that there are two limitations of time prescribed in subs. 1. When, therefore, in the
10 later proviso the Legislature specifically enacts that "the limitation of time for the commencement of actions prescribed by the
"foregoing provisions of this section shall not apply," &c., it seems to us that it can be referring only to the first limitation, for it refers to one limitation only, and it specifies that as the limitation
15 of three months for the commencement of the action. Had the Legislature intended to abolish the necessity of a worker giving one month's notice of his intended action, it would have surely so provided by referring to that limitation also, or at least by using the word "limitations" in the plural, or simply by saying,
20 "Provided that the foregoing provisions shall not apply," &c. A point has been made that although the word "limitation" is used in the singular, the use of the word "provisions" in the plural indicates that the Legislature was referring to both limitations. But subs. 1 contains more than one provision, and the only proper
25 way in which to refer to such provisions is to use the plural. One of these provisions is the limitation of time for the commencement of an action, and, in our opinion, Parliament used clear words to indicate its intention of referring to that limitation only. If that is so, then it is clear that the intention of the amendment
30 was merely to enlarge that limitation from three to six months. If the words of the proviso had been "and any such action may be brought within six months," &c., there could be no doubt whatever as to the intention. But it is claimed that because the proviso enacts that "any such action may be brought at any time
35 "within six months," &c., the words "at any time" effect an implied repeal of the requirement of one month's notice with respect to workers injured in the course of their employment. But so to hold would be to give a meaning to the last words of the proviso inconsistent with the earlier words. The earlier part
40 clearly refers only to "the limitation of time for the commencement of actions." If that be so, then the reference in the proviso to *foregoing* provisions indicates that the provisions in the subsequent subsections were still intended to be in force. When,

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therefore, the later words provide that instead of a limitation of three months such an action may be brought at any time within six months, that must mean subject to all conditions prescribed by the section, including the giving of one month's notice. In spite of the use of the words "at any time," we think this is the true construction of this proviso, remembering that it is merely a proviso to the first subsection of s. 248, and that in its first words it indicates the intention of the Legislature to deal only with the limitation of time for the commencement of actions.

The rule of construction of a proviso is not to treat it as an independent enacting clause, but as being dependent on the main enactment. In *R. v. Dibdin*(2), *Fletcher Moulton*, L.J., said: "The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in such cases as *Ex parte Partington* (6 Q.B. 649), *In re Brockelbank* (23 Q.B.D. 461), and *Hill v. East and West India Dock Co.* (9 App. Cas. 448), have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso"(3).

If the latter words of the proviso are construed as an independent enactment and taken in their literal sense, then merely by implication they effect a repeal not only of the provision as to notice contained in subs. 1, but also of subs. 2 giving the defendant the right to tender amends before the action is brought, for the defendant Board cannot avail itself of that provision if it receives no notice of the intended action. Implied repeals are not favoured by the Courts, and it is only where the two provisions are absolutely inconsistent and cannot be read together that a later enactment may be held to have impliedly repealed an earlier one. In this case there is no difficulty in reading the two together. The proviso refers to the first limitation of time only, and enacts that instead of being brought within three months the action may be brought at any time within six months, but subject to the provisions of the section such as notice and the right to tender amends. The requirement of adequate notice before the bringing of an action against the Crown or a public body or local authority is one that

(2) [1910] P. 57.

(3) *Ibid.*, 125.

is prescribed in many statutes, such as the Crown Suits Act, 1928, s. 28, the Municipal Corporations Act, 1933, s. 361, and the Electric-power Boards Act, 1925, s. 127. It is evidently considered by the Legislature to be an important provision for the protection of the defendant. It is unlikely that the Legislature should have intended to repeal this provision in the case of Harbour Boards only when sued by workers, leaving it in all the other Acts in which it occurs as a requirement still to be observed by workers. It is much more reasonable to suppose that all the Legislature intended to do by the amendment was in the case of workers to enlarge the time for the commencement of actions from three to six months. In our opinion that is all that the proviso effects.

With regard to the second question of law, having decided the first point as we have, it is not necessary to decide the second question. We agree, however, that the words "Any worker in the course of his employment" are not confined to employees of Harbour Boards. They are wide enough at least to cover a wharf-labourer while working on the wharf whoever his employer may be. A very similar point was recently decided by the House of Lords in *Izzard v. Universal Insurance Co., Ltd.*(4). That was a case on the construction of an accident-insurance policy, but it was also necessary to construe s. 36 (1) (b) (ii) of the Road Traffic Act, 1930. Section 36 contains a provision for a compulsory insurance by all users of motor-vehicles in respect of liability for death or bodily injury to any person arising out of the use of the vehicle on the road. There were certain exceptions, but the clause construed was a proviso enacting in effect that the insurance must cover liability in cases in which passengers are carried for hire or reward or *by reason of and in pursuance of a contract of employment*. The question was whether the words in italic were confined to contracts of employment with the owner of the motor-vehicle. The House of Lords held that they were not so confined. Lord Wright, in delivering the judgment of the Court, said: "I see every practical reason for construing the phrase 'in the Act 'contract of employment' as including a contract with a third party. This does not exclude a contract with the insured person. The words used are apt to include both cases. As a matter of words, I think the plain meaning is the true meaning. The words of the statute are general and unlimited. To insert the words 'with the insured person' would be to insert words of specific limitation beyond what can be inferred from the general tenor of the Act or policy. If these words

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"had been intended, they could and should have been expressed, "as was done in the previous paragraph. They are not expressed "and in my opinion ought not to be and cannot properly be "implied"(5). So in this case the words to be construed are general and unlimited, and it would require the insertion of further words to limit the words "any worker in the course of his "employment" to workers employed by the Harbour Boards.

In our opinion, for the reasons stated, the appeal should be allowed with costs on the lowest scale.

FAIR, J. This appeal is wholly concerned with the construction of s. 248 of the Harbours Act, 1923, as amended. That section as originally passed read as follows :—

(1) No plaintiff shall recover in any action commenced against a Harbour Board or person for anything done in pursuance of this Act unless such action is commenced within three months after the act is committed, and unless notice has been given to the defendant one month before such action is commenced of such intended action, signed by the plaintiff or his solicitor, specifying the cause of such action.

(2) The plaintiff shall not recover in any such action if tender of sufficient amends has been made to him or his solicitor by or on behalf of the defendant before such action is brought.

(3) In case no such tender is made, the defendant may, in accordance with the rules of the Court in which the action is brought, pay into Court such sum of money as he thinks proper.

(4) The defendant may plead the general issue, and give the special matter in evidence, and that the same was done in pursuance and under the authority of this Act.

(5) If the same appears to have been so done, or if the respective limits of time prescribed by subsection one hereof are not duly observed, or if the action is commenced after sufficient satisfaction has been made or tendered as aforesaid, then and in every such case the verdict or judgment shall be for the defendant.

(6) If the verdict or judgment is for the defendant, or if the plaintiff discontinues the action or is nonsuited, the defendant shall have the ordinary costs.

(7) Nothing in this section shall be deemed to give any person any further or greater remedy against the Crown in respect of anything done under this Act than such person has by any law for the time being in force.

It was amended by s. 31 of the Statutes Amendment Act, 1936, which reads as follows :—

Section two hundred and forty-eight of the Harbours Act, 1923, is hereby amended by adding to subsection one thereof the following proviso :—

" Provided that the limitation of time for the commencement of actions, prescribed by the foregoing provisions of this section, shall not apply "with respect to any action for damages in respect of an injury suffered "by any worker in the course of his employment, and any such action may "be brought at any time within six months after the cause of action arose."

The first question which arises in the present proceeding is whether the words "any worker in the course of his employment" should be read as restricted to workers in the employment of a

Harbour Board. I see no sufficient reason for restricting them in this way, and do not think it necessary on this aspect of the appeal to add anything to what has been said by the learned Judge in the Court below and the other members of this Court.

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- 5 The second question is as to whether the amendment dispenses in such cases with the requirement that notice of action should be given one month before the action is commenced. In support of his argument that it does, Mr. *Hardie Boys* relies strongly on subs. 5 of s. 248. This refers to the requirement that notice
- 10 should be given one month before such commencement in the phrase "the respective limits of time prescribed by subsection one "hereof." That phrase does indicate clearly that the words "limits of time" were considered by the draftsman of s. 248 as a suitable phrase by which to include the condition in subs. 1
- 15 which made a month's previous notice requisite to the right of action. The draftsman of the amending section may well have considered the phrase "limitation of time" as equally suitable. It is to be noted, however, that he has not chosen to use the same phrase as that used in subs. 5, nor has he used the plural. These
- 20 facts justify the inference that the words "limitation of time" were intended to have a different meaning from that conveyed by the words "limits of time," and to be confined to one limitation. Apart from the phrase to which I refer in the next paragraph, the provision in the proviso would, I think, in its natural meaning,
- 25 apply only to the limitation of the time within which the action was to be commenced and not to the limitation of time before it could be commenced, which results from the notice required to be given.

- But the respondent's counsel relies strongly on the concluding
- 30 words of the proviso "*at any time* within six months after the cause "of action arose." He urges that these words cannot have their full or natural meaning if a month's notice of action has to be given, as the period within which the action may be brought is thereby reduced to, at most, the five months remaining after notice has
- 35 been given. But if the meaning I have attached to the preceding words is correct subs. 1 read as a whole means "at any time within "six months after the cause of action arose *notice of action having "been duly given.*" It is not necessary expressly to insert those words where it is apparent that the meaning expressed by them
- 40 is the meaning of the subsection read as a whole.

This construction is confirmed by the fact that upon the alternative meaning contended for by the respondent's counsel, the notice of action could be given at any time, however short, before

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the commencement of the action. This, as Mr. *Hardie Boys* admits, in effect would involve an implied repeal, so far as the class of action being considered is concerned, of subss. 2, 3, and a portion of subs. 5. In consequence it would deprive the Harbour Board in this class of action of the special rights conferred by those subsections. 5

A repeal by implication is effected only if the later provision is so inconsistent with or repugnant to the earlier one that the two cannot stand together: *Weston v. Fraser*(1). Clearly that cannot be said here. 10

The principle laid down by Lord *Herschell* in *Colquhoun v. Brooks*(2), therefore, applies with special force: "It is beyond dispute, too, that we are entitled, and indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light upon the intention of the Legislature, and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the "Act"(3). 15

The result of the consideration I have given the matter may be summarized as follows: Section 248 as originally enacted clearly conferred on Harbour Boards a right to a month's notice of action in cases of this kind. The language in the amendment, upon which the respondent relies as depriving them of this right is, at least, ambiguous in this respect. A right conferred in clear language subsists until it is repealed. The intention so to repeal it must clearly appear from the later legislation. That condition is, in my opinion, not satisfied here. I agree, therefore, that the appeal should be allowed; and that the question asked should be answered by saying that the plaintiff is precluded from recovering against the Wellington Harbour Board by reason of a month's notice of action required by s. 248 (1) of the Harbours Act, 1923, not having been given before the issue of the writ. 20 25 30

Appeal allowed.

Solicitors for the appellant: *Izard, Weston, Stevenson, and Castle* (Wellington).

Solicitors for the respondent: *Hardie Boys and Haldane* (Wellington).

(1) [1917] N.Z.L.R. 549; (*sub. nom.* *Hunter Weston v. Fraser*) (2) (1889) 14 App. Cas. 493.
G.L.R. 179. (3) *Ibid.*, 506.

[IN THE SUPREME COURT.]

TALLY v. MOTUEKA BOROUGH.

S.C.
NELSON.

1939.

March 16 ;
April 5.

REED, J.

Fire Brigade—Statutory Immunity from Liability—Damage to Property by Fire Brigade in Exercise of Duty in connection with Fire—Whether such Immunity absolute—Fire Brigades Act, 1926, s. 52—Fire Brigades Amendment Act, 1932, s. 16—Municipal Corporations Act, 1933, s. 271—Municipal Corporations Amendment Act, 1938, s. 29.

The immunity from liability for damage to property granted by s. 52 of the Fire Brigades Act, 1926 (as amended by s. 16 of the Fire Brigades Amendment Act, 1932), and also granted by s. 271 of the Municipal Corporations Act, 1933 (as amended by s. 29 of the Municipal Corporations Amendment Act, 1938), is absolute; and, provided that the work was authorized by the statute and done *bona fide*, liability does not attach to any of the persons named in such sections if negligence be proved (a) on the part of the person authorizing the work in the selection of his agent or otherwise, or (b) on the part of the person actually carrying out the work.

QUESTION OF LAW ordered to be argued before trial.

Following upon a fire at Motueka, a wall of a building was left standing in a dangerous condition. Shortly after the fire, the wall was ordered to be demolished. On August 3, 1938, in 5 the course of this being carried out, the wall fell, and did damage to the premises of the plaintiff. The orders for the demolition were given by the Mayor of Motueka and a fire-inspector who was also captain and principal officer of the Motueka Fire Brigade. The plaintiff alleged that the demolition was carried out negligently, 10 and claimed damages from the borough.

The question asked was as follows: "Is the immunity given " by s. 52 of the Fire Brigades Act, 1926 (as amended by s. 16 " of the Fire Brigades Amendment Act, 1932), and by s. 271 of the " Municipal Corporations Act, 1933 (as amended by s. 29 of the 15 " Municipal Corporations Amendment Act, 1938), absolute, or " does liability for damage attach to any of the persons named " in such sections if negligence be proved (a) on the part of the " person authorizing the work in selecting his agent or otherwise, " or (b) on the part of the person actually carrying out the work."

20 Glasgow, for the plaintiff.
Fell, for the defendants.

Cur. adv. vult.

REED, J. [After stating the facts, and setting out the question of law for argument:] There is an oversight in stating this

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question, inasmuch as s. 29 of the Municipal Corporations Amendment Act, 1938, was not in force when the cause of action, if any, accrued to the plaintiff. This amending Act came into force on August 18, 1938, whilst the damage was caused to the plaintiff's buildings by the demolition of the wall on August 3, 1938. The question must, therefore, be considered from the point of view of the law as it existed before the amendment was passed. It makes no real difference. 5

Section 52 of the Fire Brigades Act, 1926, as amended, is as follows :— 10

No liability shall attach to the Fire Board or any of its members or officers in respect of any damage to property occasioned by the Superintendent or any officer or member of a fire brigade in the *bona fide* exercise of his duty at or in connection with any fire, or in respect of any damage to property occasioned by such Superintendent, officer, or member taking any *bona fide* action in connection with any fire occurring beyond the area in which the fire brigade has authority, but such damage shall be deemed damage by fire within the meaning of any policy of insurance against fire covering the damaged property. 15

And s. 271 of the Municipal Corporations Act, 1933, as it existed on August 3, 1938, is as follows :— 20

The Mayor and the principal officer of a municipal fire brigade shall respectively have and may exercise within the borough the powers and authorities conferred upon a Superintendent of a fire brigade by the Fire Brigades Act, 1926, and the Mayor and such principal officer and the Corporation shall respectively have the same immunities from liability in regard to the exercise of any such power and authority as a Fire Board and the Superintendent of a fire brigade respectively have under the provisions of the said Act. 25

The authority to order the demolition of a dangerous portion of a building conferred on a Superintendent of a fire brigade and by the above s. 271 conferred on the Mayor and (or) principal officer of a municipal fire brigade is contained in s. 48 (j) of the Act of 1926 which reads as follows :— 30

He may, at the time of a fire or afterwards, pull down or shore up any building or any portion of a building which in his opinion has been so damaged by fire as to be or to be likely to become dangerous to life or property, and the expense of any such operation shall be borne by the owner of such building, and shall be paid by him to the Board. 35

The act of ordering the demolition of the wall, therefore, was authorized by statute. The mere fact that it was done under statutory authority, however, would not *per se* be an answer to a claim based on the ground that the work was negligently performed. The law is stated in 23 *Halsbury's Laws of England*, 2nd Ed., para. 917, as follows :— 40 45

In the case of a public authority or a body exercising statutory powers a duty to take care may or may not exist in favour of a particular individual. Where such a duty exists, the authority or body is liable for an injury caused to that individual by a breach of the duty to take care so owed to him, unless the statute expressly or impliedly excludes such liability. 50

Accordingly, as negligence involves the existence of a duty to take care and a breach of that duty, an individual who is injured by negligence in the

performance of a statutory duty has a right of action in respect of that negligence unless his right is expressly or impliedly excluded.

As an example is cited the case of *Raleigh Corporation v. Williams*(1), in which it was held by the Privy Council that a right of action
5 existed for a breach of a duty to repair part of a drainage system but not for negligent construction of another part as to which arbitration was indicated as the remedy.

In the present case the immunity from liability purports to be absolute if the work was authorized by the statute and done *bona*
10 *fide*. In order to ascertain whether or not the Legislature intended that the immunity should extend to covering the negligent performance of the work, it is permissible to take into consideration the nature and object of the legislation. It is to be observed that the
15 work is, in the majority of cases, to be exercised in circumstances when little or no time would be given for consideration, when speed and prompt action was called for if a fire was to be kept within bounds. The immunity granted is not, however, limited to the case of action when a fire is raging, but extends to all actions
20 "at the time of a fire or afterwards." If absolute in the case of an act done during the progress of a fire, it is equally absolute when, as in the present case, it was some hours after the fire. The Legislature might well have considered the necessity for providing for absolute immunity so that the officer ordering the work and
25 those performing it could work untrammelled by any fear of their actions, performed in good faith, being subjected to a critical examination afterwards as to whether or not the work had been performed negligently. It is common knowledge that in actions before juries between an injured plaintiff and a local body as
30 defendant sympathetic verdicts are far from uncommon. It may well be that, in these circumstances, and with this knowledge, the Legislature should take the somewhat unusual course of granting absolute immunity so that officers and members of a fire brigade could devote their whole attention, regardless of consequences,
35 to their main duty of suppressing the fire, and, as I have already said, the immunity is extended equally to acts after the fire carried out *bona fide* for the protection of life and property. These considerations afford a valid reason for granting absolute immunity : Is the intention to do so clearly manifested ? I think it is. I
40 think that the provision for compensation for damage caused through the carrying-out of the statutory duties and authorities is a strong indication that the Legislature intended that that

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should be the only remedy. Full compensation is provided by the provision that

such damage shall be deemed damage by fire within the meaning of any policy of insurance against fire covering the damaged property.

It was stated at the bar that the plaintiff had no policy of insurance on the property damaged. The question as to whether there is absolute immunity cannot be made to depend on whether or not the owner of the property damaged had taken the elementary precaution of insuring his premises against loss by fire. When coupled with the existence of a statutory provision for a remedy the provision in the immunity clause that "no liability shall "attach" is, in my opinion, clearly indicative of the intention of the Legislature that the immunity should be absolute. It is to be observed, in this connection, that no immunity is granted in respect of personal injury; it is confined to damage to property for which the Legislature makes special provision.

It was contended that there is a distinction between duties imposed and discretionary powers given, and that although the absolute immunity might apply in the former case it could not in the latter, and that the demolition of the wall was a discretionary power. I cannot agree that there is any distinction. The discretionary power is to order the demolition if in the opinion of the officer in charge the part of the building affected "has "been so damaged by fire as to be or to be likely to become dangerous "to life or property." If the officer in charge *bona fide* believes that the condition of the wall renders it dangerous to life or property, clearly an inferential duty arises to order its demolition. In any case, the immunity from liability is expressed to extend to the exercise of "any such powers and authorities." In my opinion, the immunity is absolute, provided only that the order for demolition was given in good faith as to its necessity. There is no suggestion that the work was not ordered and done *bona fide*.

My answer to the question asked is, therefore, that the immunity is absolute, and no liability attaches to any of the persons mentioned.

In these circumstances, it becomes unnecessary to consider the further question as to whether or not the municipality is responsible for any alleged negligence of the Mayor in exercising the powers and authorities vested in him by s. 271 of the Municipal Corporations Act, 1933.

The defendant is entitled to costs, which I allow at £10 10s., and disbursements.

Judgment for the defendant.

Solicitor for the plaintiff: *K. E. Knapp* (Nelson).

Solicitors for the defendants: *Fell and Harley* (Nelson).

PORTERFIELD v. PENINSULA COUNTY AND SEATON.

S.C.
DUNEDIN.

1939.

May 29,
July 31.

BLAIR, J.

Rating—Rates and Rate-book—County—Ten-per-cent. Penalty—Whether Part of Original Rate—Disqualification from voting of Ratepayer whose Rates or Part thereof unpaid—Whether Non-payment of Rates for one Riding disqualifies Ratepayer from Voting in another Riding in respect of which his Rates are paid—Rating Act, 1925, s. 76—Counties Act, 1920, ss. 4, 57.

The additional charge of 10 per cent. (to be added according to s. 76 of the Rating Act, 1925, as the penalty for non-payment of rates), when added, becomes together with the original rate one indivisible rate as if included in the original demand, and default in payment of such charge is default in payment of part of the rate.

The disqualification imposed by s. 57 (1) of the Counties Act, 1920, on a ratepayer, whose rates or any part thereof have remained unpaid for not less than six months from voting at an election or poll, applies to an election in any riding in the county, even if the elector has paid his rates in that riding but made default in the payment of rates in some other riding.

Quære, Whether a county clerk placing a ratepayer on the defaulters' list under s. 57 of the Counties Act, 1920, is acting in a quasi-judicial capacity, so as, in the absence of proof of express malice, not to be liable for drawing a wrong conclusion of law.

APPEAL on point of law from the decision of a Stipendiary Magistrate.

One respondent was the Corporation of Peninsula County and the other was its clerk. The appellant was and had for many 5 years been a ratepayer and an elector of the county for all county elections. He was enrolled in respect of three of the ridings in the county, and, as such, was entitled altogether to six votes, those votes being respectively two for North-east Harbour Riding, one for Broad Bay Riding, and three for Highcliff Riding.

10 An election of members of the County Council was held on May 11, 1938. No election was necessary for the Broad Bay Riding, but such was necessary in respect of the North-east Harbour and Highcliff Ridings.

On May 1, the respondent, Seaton, in his capacity as clerk 15 for the county, sent to the Returning Officer a list of all ratepayers whose rates or any part thereof were then unpaid and had remained unpaid for a period of not less than six months, and included in such list was the name of the appellant.

All rates due to the respondent county for the year April 1, 20 1937, to March 31, 1938, were payable without the imposition of an additional charge of 10 per cent. up to and including March 21, 1938, and an additional charge of 10 per cent. was added to all 1937/38 rates unpaid as on March 22, 1938.

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The appellant, prior to the additional charge of 10 per cent. payable on March 22, 1938, had paid the 1937/38 rates on his properties in the Broad Bay and Highcliff Ridings as well as portion of the rates payable on his North-east Harbour Riding property. At the time (March 22, 1938) of the imposition of the additional charge of 10 per cent. the appellant had not paid the sum of £5 10s. 3d., being the balance of the 1937/38 rates on his North-east Harbour Riding property and the additional charge of 11s. was added thereto.

The said sum of £5 10s. 3d. was paid by the appellant on March 24, 1938, but the additional sum of 11s., already added as mentioned, was not paid; and it remained unpaid on May 1, 1938, the date upon which the defaulters' list was sent to the Returning Officer.

The appellant's only default at the time of the transmission of the defaulters' list was in respect of the said sum of 11s. additional charge on the portion of the North-east Harbour Riding rates unpaid after six months and fourteen days after demand therefor: s. 76, Rating Act, 1925. The only reason for the inclusion of the appellant's name in the defaulters' list was because he had not paid such 11s. additional charge.

In consequence of the appellant's name being on the defaulters' list, his application to vote for councillors for the Highcliff and North-east Harbour Ridings was refused by the Returning Officer. Mr. Seaton, in considering whether it was proper to put the appellant's name on the defaulters' list in respect of his default in respect of the said additional charge, consulted opinions which had been given by the solicitor to the Counties Association, which opinions were not given specially in regard to this particular case, and had been actually given in the year 1922.

Damages were claimed by the appellant against both respondents for deprivation of his right to vote.

J. A. Robertson, for the appellant.

Solomon, for the respondents.

Cur. adv. vult.

BLAIR, J. [After stating the facts, as above:] The learned Magistrate in Dunedin gave judgment for the respondents, and the appellant appeals on a point of law from that judgment. The ground of the Magistrate's decision was that the clerk in preparing the defaulters' list was not performing a merely clerical duty, but had to consider legal qualifications, which he duly

weighed, and that, in so doing, he was acting as a quasi-judicial functionary, and could not in the absence of proof of express malice be held liable for drawing a wrong conclusion of law.

Section 57 (1) of the Counties Act, 1920, imposes a duty on the clerk to send to the Returning Officer not later than ten days before the date fixed for any election a list of all ratepayers "whose rates or any part thereof are then unpaid and have remained unpaid for a period of not less than six months." And subs. 2 of the same section provides that no person whose name appears on such list shall be entitled to vote at an election or poll.

The first point made on behalf of the appellant is that as his only default was in respect of the 11s. additional charge, which was imposed on March 22, 1938, any default in respect of such additional charge so imposed could not be availed of in justification for placing the appellant on the defaulters' list until there had been six months' default in payment of that additional charge.

This argument postulates that the additional charge must be treated for the purposes of s. 57 as if it were in effect a separate rate, which in this case became due on March 22, 1938, and that it could not be treated as having "*remained unpaid for a period of six months*" until November 23, 1938.

We have to turn to the Rating Act, 1925, to see what is provided as to penalty for non-payment of rates. Section 76 of that Act says :

25 An additional charge of ten per centum may be added to all rates unpaid at the expiration of six months and fourteen days from the demand thereof, and shall be payable and recoverable accordingly; but such additional charge of ten per centum shall not be recoverable until a local authority has publicly notified that the same will be added.

30 No question was raised in this case as to the due giving of such public notice, and it is not disputed that the additional charge of 10 per cent. was payable on March 22, 1938.

It is to be observed that only one additional charge can be added. If the 10-per-cent. additional charge were to be treated as a separate rate, then there is much to be said for the proposition that after it has been due for six months and fourteen days an additional charge of 10 per cent. could be added to such original additional charge. For the respondents, it is submitted that at no time from the moment when his rates became payable could the appellant be treated as a man whose rates had been paid in full. Before the additional-charge period arrived, he had paid part only of his rates, leaving £5 10s. 3d. overdue, and automatically on the expiration of the additional-charge period a sum becomes "added" to that part of the rate as to which he was in

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default. If the Rating Act had said that interest at so much per cent. was to be added to the rate as from its due date until paid, such interest would become part of the rate. If the additional charge is not part of the rate and does not become for the purposes of the defaulters' list an addition to the overdue rates, then logically it would be in effect a rate separate and distinct from the ordinary rates with all the ordinary incidents of another rate. If this be so, then after due default within s. 76 of the Rating Act, 1925, this additional charge being in effect a new and distinct rate would itself become subject to an additional charge under s. 76, and this process would go on *ad infinitum*. Moreover, on the same assumption, there would be a different limitation of time for recovery of this additional charge as compared with the period of limitation fixed by s. 77 of the Rating Act. I attach importance to the fact that s. 76 of the Rating Act states that the 10-per-cent. additional charge is to be "added" to all rates "and shall be payable and recoverable accordingly." Accordingly to what? That surely means recoverable according as the rate itself to which it is added is recoverable. By adding something to a rate, the part so added becomes part of what it is added to, and it immediately acquires the characteristics of that to which it is added. The original and the added part thus become fused into one indivisible rate. If the addition becomes, as I think it is, part of the rate, then I do not see how by paying a portion which happens to coincide with what would have been the rate had something not been added to and become part of it a ratepayer can say he will allocate such payment to the original rate and leave the addition unpaid. In this particular case, it is not claimed that there was any attempt on the part of the appellant so to allocate; but that, in my view, is immaterial, because one cannot allocate a payment to the beginning or middle or end of an indivisible debt. The addition becomes just as much part of the rate as if it had been included in the original demand, and it would be the duty of the local body to treat such addition when paid as part of the rates it had collected.

A receiver appointed under s. 86 and s. 87 of the Rating Act would be entitled to the additions as part of the rates. The references to judgments for rates under ss. 78 and 79 would include the 10-per-cent. additional charge.

Absurdity would result if a construction were adopted having the effect of giving to the additional charge separate and distinct characteristics from the rate of which it, in my mind, forms an indivisible part. I hold, therefore, that the admitted default in

the payment of the sum of 11s. was a default in payment of "any part" of a rate within s. 57 (1) of the Counties Act, 1920, and the disqualification provided by subs. 2 of that section accordingly follows.

- 5 The appellant further claims that even if there were a default disqualifying him from voting at an election or poll, such disqualification must be limited to the particular riding of the county in which there has been default, and has no effect upon his voting-rights in any other riding in respect of which he is not in
10 default with his rates.

The particular default upon which the appellant's disqualification is based is in respect of rates for the North-east Harbour Riding of the county. This particular riding is one of the two in which an election was being held and at which he was refused the
15 right to vote. Assuming I am right in holding that the appellant was in default in payment of part of his rates, then, as such default was in respect of one of the very ridings at which an election was held, this particular objection can have no bearing on that portion of the Returning Officer's refusal to allow him to vote in
20 the North-east Harbour Riding.

But Mr. Porterfield had (assuming no disqualification) a right of three votes in another riding—namely, the Highcliff Riding. It becomes therefore necessary to consider whether in the circumstances of this case he has been unlawfully deprived of his right

- 25 to exercise his votes in that particular riding. This involves further consideration of s. 57 of the Counties Act, 1920. That section does not purport to limit its operation to any particular riding. It is quite general in its terms. The purposes of the section is to impose disfranchisement on defaulters, and there is
30 another and by no means unimportant purpose of providing a spur for getting in the rates. If the point made be sound that default can apply only to the particular riding in which default occurs, such an interpretation would be to the advantage of large landowners in the county in that the prick of the spur would be
35 ineffective in such ridings of the county as they chose to select to make default in. Elections are limited to ridings, and polls may be either general or limited to certain electors or ratepayers. At a general poll, therefore, disqualification in respect of default in rates for any riding would disqualify, because it would not be
40 possible to separate out any riding in respect of such a poll. Section 38, which refers to elections for ridings, is made subject to the provisions as to disqualification based on default in payment of rates. As I understand the law as to interpretation of a

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statute, it is to be read according to its ordinary meaning unless one is forced to adopt some other meaning. The only part of s. 57 that could be pointed to as suggesting some other than its ordinary meaning is the use of the singular when referring to the Returning Officer. This point arises, because by s. 4 of the Local Elections and Polls Act, 1925, it is provided that for every "district" there shall be a Returning Officer appointed by the local authority. "District" is defined by that Act as meaning the district comprised within the jurisdiction of a local authority, and includes the riding of a county or any subdivision of a district for electoral purposes. That means that if an election is in only one riding a Returning Officer is required for that particular subdivision. I read the words "Returning Officer" in s. 57 as referring to the Returning Officer of every district in which there is an election where a disqualified elector may attempt to vote. The use, therefore, of the singular in s. 57 does not carry us anywhere.

I can find nothing in the statute to constrain me to adopt some meaning to s. 57 different to its ordinary natural meaning. I cannot, therefore, interpret its language as meaning that the disqualification is limited in effect to any particular riding in the county in which there is default.

It follows, therefore, that, in my view, the plaintiff was properly placed upon the defaulters' list in the circumstances disclosed in this case, and was properly excluded from voting.

The learned Magistrate based his dismissal of the appellant's case upon the ground that the clerk in placing the appellant on the defaulters' list was acting in a quasi-judicial capacity. There is something to be said for the soundness of this view, but I thought it advisable in this case to examine the other aspects of the case first, and on the conclusion I have come to it is not necessary for me to go into this further point.

The appeal will be dismissed with £5 5s. costs.

Appeal dismissed.

Solicitors for the appellant: *Ramsay and Haggitt* (Dunedin).

Solicitors for the respondents: *Solomon, Gascoigne, Solomon, and Sinclair* (Dunedin).

[IN THE COURT OF APPEAL.]

IRVINE AND COMPANY, LIMITED v. DUNEDIN CITY CORPORATION.

Municipal Corporation—Nuisance—Water escaping from Pipes of Waterworks System under Street and flooding Goods in Basement—Whether “Nuisance” includes Private as well as Public Nuisance—Liability of Corporation where no Negligence—Municipal Corporations Act, 1933, ss. 2, 168, 171, 173, 244 (1), 245.

The defendant Corporation, as part of its waterworks system, constructed and maintained under statutory authority, carried water in a pipe under the surface of a street. The water escaped from the pipe, entered the basement of the plaintiff's premises (below the levels of the street and of the mains), and damaged the plaintiff's goods therein. The plaintiff sued to recover the amount of such damages, basing his claim solely upon nuisance. Negligence was not alleged.

Held, by the Court of Appeal (Myers, C.J., Smith, Johnston, and Fair, JJ., Ostler, J., dissenting), in an action removed from the Supreme Court for argument, 1. That s. 173 of the Municipal Corporations Act, 1933, applies to a private as well as a public nuisance, but not to a nuisance which is necessarily or inevitably involved in the construction and maintenance of an authorized public work and which would found a claim for compensation under s. 171 of the said Act.

Bank of New Zealand v. Blenheim Borough(1); *Lytle v. Hastings Borough*(2); *Fortescue v. Te Awamutu Borough*(3); *O'Brien v. Wellington City Corporation*(4); *Kirkcaldie v. Wellington City Corporation*(5), overruled, in so far as the dicta and decisions therein that the “nuisance clause” in Municipal Corporations Acts applied only to public nuisances.

Shelfer v. City of London Electric Lighting Co.(6); *Jordeson v. Sutton, Southcoates, and Drypool Gas Co.*(7); *Midwood and Co., Ltd. v. Manchester Corporation*(8); *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*(9); *North-western Utilities, Ltd. v. London Guarantee and Accident Co., Ltd.*(10); and *Collingwood v. Home and Colonial Stores, Ltd.*(11), applied.

London, Brighton, and South Coast Railway Co. v. Truman(12); *Green v. Chelsea Waterworks Co.*(13); *Cox Bros. (Australia), Ltd. v. Commissioner of Waterworks*(14); *Burniston v. Corporation of Bangor*(15); *Robinson Brothers (Brewers),*

(1) [1885] N.Z.L.R. 4 S.C. 10.

(2) [1917] N.Z.L.R. 910; G.L.R. 553.

(3) [1920] N.Z.L.R. 281; G.L.R. 214.

(4) [1928] N.Z.L.R. 215; [1925] G.L.R. 129.

(5) [1938] N.Z.L.R. 1101; G.L.R. 719.

(6) [1895] 1 Ch. 287.

(7) [1899] 2 Ch. 217.

(8) [1905] 2 K.B. 597.

(9) [1914] 3 K.B. 772.

(10) [1936] A.C. 108.

(11) [1936] All E.R. 200.

(12) (1885) 11 App. Cas. 45.

(13) (1894) 70 L.T. 547.

(14) [1934] S.A.S.R. 101; aff. on app.

50 C.L.R. 108.

(15) [1932] N.I. 178.

MUNICIPAL CORPORATIONS ACT, 1933, s. 173.—Nothing in this Act shall entitle the Council to create a nuisance, or shall deprive any person

of any right or remedy he would otherwise have against the Corporation or any other person in respect of any such nuisance.

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April 17,
18;
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OSTLER, J.
SMITH, J.
JOHNSTON, J.
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Ltd. v. Durham County Assessment Committee(16); and *Barras v. Aberdeen Trawling and Fishing Co., Ltd.*(17), distinguished.

D'Emden v. Pedder(18) and *In re Otago Clerical Workers' Award*(19), referred to.

As to necessary or inevitable nuisance:

St. Kilda Borough v. Smith(20); *Manchester Corporation v. Farnworth*(21); *Fullarton v. North Melbourne Electric Tramway and Lighting Co.*(22); *Fitzgerald v. Kelburne and Karori Tramway Co., Ltd.*(23); *Wood v. Taranaki Electric-power Board*(24); and *London, Brighton, and South Coast Railway Co. v. Truman*(25), applied.

As to maintenance and compensation:

Colac Corporation v. Summerfield(26); *Metropolitan Water, Sewerage, and Drainage Board v. O. K. Elliot, Ltd.*(27); *Lytle v. Hastings Borough*(28); *Aitchison v. Bruce County*(29); and *Farrelly v. Pahiatua County*(30), applied.

Rickards v. Lothian(31); *Western Engraving Co. v. Film Laboratories, Ltd.*(32); *Price's Patent Candle Co., Ltd. v. London County Council*(33); and *Jones v. Festiniog Railway Co.*(34), referred to.

2. That the doctrine of *Rylands v. Fletcher*(35) applied to the case of water carried by the Corporation in pipes under the street.

The principle of *Rylands v. Fletcher*(36) applied, and its application explained.

3. That a nuisance within s. 173 of the Municipal Corporations Act, 1933, had been created, and the plaintiff was entitled to recover.

(16) [1938] A.C. 321.

(17) [1933] A.C. 402.

(18) (1904) 1 C.L.R. 91.

(19) [1937] N.Z.L.R. 578; G.L.R. 388.

(20) (1902) 21 N.Z.L.R. 215; 4 G.L.R. 342.

(21) [1930] A.C. 171.

(22) (1916) 21 C.L.R. 181.

(23) (1901) 20 N.Z.L.R. 406; 4 G.L.R. 42.

(24) [1927] N.Z.L.R. 392; G.L.R. 235.

(25) (1885) 11 App. Cas. 45.

(26) [1893] A.C. 187.

(27) (1934) 52 C.L.R. 134.

(28) [1917] N.Z.L.R. 910; G.L.R. 553.

(29) (1896) 15 N.Z.L.R. 483.

(30) (1903) 22 N.Z.L.R. 683; 5 G.L.R. 294.

(31) [1913] A.C. 263.

(32) [1936] 1 All E.R. 106.

(33) [1908] 2 Ch. 526.

(34) (1868) L.R. 3 Q.B. 733.

(35) (1868) L.R. 3 H.L. 330.

(36) (1868) L.R. 3 H.L. 330.

ACTION claiming special damages for nuisance removed into the Court of Appeal for argument.

The plaintiff company was the owner or lessee of the basement of certain premises fronting Princes Street in the City of Dunedin. The defendant Corporation, as part of its waterworks system, carried water in a pipe or pipes under the surface of that street. In the month of December, 1937, water escaped from such pipe or pipes, entered the basement of the plaintiff's premises, and caused considerable damage to the goods of the plaintiff therein.

It was alleged by the plaintiff that the escape of such water constituted a nuisance for which the defendant was liable. The defendant's contention was that the water-pipe or pipes in question formed part of its waterworks system established by statutory authority, and consequently that it was under no

liability, unless negligence be alleged and proved. Negligence was not alleged.

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Brash, for the plaintiff. A. The defendant, under the rule in *Rylands v. Fletcher*(1) is liable for the escape of water, irrespective of negligence: Municipal Corporations Act, 1933, s. 244, which defines "waterworks," which includes pipes as part of the waterworks: see s. 258 (j), (k). The authority to construct is permissive, not mandatory: s. 245. Section 171 is the compensation clause, and s. 173 the nuisance clause. The language of s. 173 is practically the same as the section in previous statutes from the Municipal Corporations Act, 1876, onwards. Compensation is to be claimed under the Public Works Act, 1928, s. 79, which was repealed, and was re-enacted by s. 28 of the Finance Act (No. 2), 1936. The statutes refer to damage to land and not to goods.

As to the English law as to nuisance and the effect of nuisance clauses, see *Salmond on Torts*, 9th Ed. 48, 50, 240, 595, 596; 24 *Halsbury's Laws of England*, 2nd Ed. 32, para. 60, 38, para. 69, 39, para. 69, note (d); *Clerk and Lindsell on Torts*, 9th Ed. 471, 484, 501; *Jordeson v. Sutton, Southcoates, and Drypool Gas Co.*(2); 1 *Smith's Leading Cases*, 13th Ed. 914; and *Shelfer v. City of London Electric Lighting Co.*(3) (which shows the effect of a nuisance clause in negating statutory authority). In *Midwood and Co., Ltd. v. Manchester Corporation*(4) (where, as in the last-mentioned case, the presence of a compensation clause did not affect the nuisance clause), the case was pleaded and argued alternatively in negligence and in nuisance. The jury found negligence, but the case was decided solely on the question of negligence. In cases of nuisance, negligence is irrelevant. Whether or not there was a compensation clause in *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*(5) does not appear: the statute was a private Act.

B. Certain New Zealand cases were wrongly decided, in that they decided that the nuisance clause applies only to public nuisances: see *Bank of New Zealand v. Blenheim Borough*(6), where the reference to general nuisance and the reference to the work being not authorized by statute were *obiter*; cf. 24 *Halsbury's Laws of England*, 2nd Ed. 24, para. 42. The words of s. 173 are ambiguous and in the widest possible terms, and

(1) (1868) L.R. 3 H.L. 330.

(2) [1899] 2 Ch. 217.

(3) [1895] 1 Ch. 287, 295, 296, 310, 313.

(4) [1905] 2 K.B. 597, 598, 603, 604, 605.

(5) [1914] 3 K.B. 772, 778, 779, 781, 782, 786.

(6) (1885) N.Z.L.R. 4 S.C. 10, 12.

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there is nothing to indicate that the section is confined to public nuisances, which are of such a nature as to make any restriction to them improbable. As to what are considered public nuisances, see *Salmond on Torts*, 9th Ed. 229, 230, and *2 Stroud's Judicial Dictionary*, 2nd Ed. 229, 230. The nuisance clause is in a statute authorizing the construction of public works of widely varying nature, which commonly affect private property, and the clause cannot be confined to the creation of a public nuisance by a public body, which is so rare that it is unlikely that the clause was designed to prevent public nuisances. In *Lyttle v. Hastings Borough*(7) *Edwards, J.*, assumed that a right of compensation existed, without having considered the effect of the nuisance clause. The nuisance clause is of the first importance on the question of the right to compensation, as s. 150, if read literally, takes away the statutory authorization of nuisances. Compensation cannot be granted for something which is not authorized by the Act, and is not so authorized. Compensation and damages cannot both be claimed. See *Salmond on Torts*, 9th Ed. 230, for a definition of "nuisance." There was no nuisance clause in the English cases referred to in *O'Brien v. Wellington City Corporation*(8). There is only one English case in which it is suggested that "nuisance" does not include a private nuisance: see *Jordeson v. Sutton, Southcoates, and Drypool Gas Co.*(9). *Lyttle's* case and *O'Brien's* case are the only two cases expressly deciding in New Zealand that the nuisance clause relates solely to public nuisances, and does not extend to private nuisances; though there are *dicta* in other cases to the same effect. In view of the English decisions, the two New Zealand cases were wrongly decided. If not, they are distinguishable: see *Lambert v. Lowestoft Corporation*(10).

C. If the New Zealand decisions are held to be correct, nevertheless they can be distinguished because in those cases compensation under the Municipal Corporations Acts may have been available, while in the present case compensation is not available, on the following grounds: (i) Damages for the possibility of a nuisance of this nature are not capable of estimation. (ii) Compensation under the Act is limited to damage to land and not to goods. (iii) Compensation under the Acts is limited to damage resulting from construction of works, and

(7) [1917] N.Z.L.R. 910, 915, 916, 917, 918; G.L.R. 553, 554, 555, 556. (8) [1928] N.Z.L.R. 215, 218, 221, 222; [1925] G.L.R. 129, 131, 133.

(9) [1899] 2 Ch. 217, 219, 226, 237. (10) [1901] 1 Q.B. 590, 595.

not from their subsequent user. (a) In the present case compensation could not have been recovered, and that is a ground for distinguishing the New Zealand cases, see *Wood v. Taranaki Electric-power Board*(11). (b) Under s. 171 compensation is to
 5 be claimed, and must be determined in manner provided by the Public Works Act, 1928, and there is no provision for compensation except in respect of the value of lands and of injury to land.

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D. Even in the absence of a nuisance clause this claim could succeed; as the nuisance complained of is not authorized by
 10 statute, the defence of statutory authority is not available. The nuisance is not authorized, because (i) the statute is permissive: Municipal Corporations Act, 1933, s. 245; *Salmond on Torts*, 9th Ed. 49, 50, 51; *Clerk and Lindsell on Torts*, 9th Ed. 484. (ii) The nuisance complained of is not a necessary,
 15 natural, or inevitable consequence of the construction of the waterworks: see *Salmond on Torts*, 9th Ed. 48, 49; *Shelfer v. London Electric Lighting Co.*(12); *Metropolitan Asylum District v. Hill*(13); *Aitcheson v. Bruce County*(14); and *Fullarton v. Melbourne Tramways*(15). As to the construction of s. 171, see
 20 *Craies on Statutes*, 4th Ed. 114. (iii) The use of the word "negligence" is another way of saying that the statute does not authorize works which cause damage that could be avoided: *Midwood v. Manchester Corporation*(16); *Metropolitan Asylum District v. Hill*(17); *Shelfer v. City of London*(18); *Aitcheson v.*
 25 *Bruce County*(19); and *Fullarton v. Melbourne Tramway Co.*(20).

A. N. Haggitt, for the defendant. Negligence is not alleged against the defendant, and the sole question is whether the doctrine of *Rylands v. Fletcher* is applicable or not. There is no
 30 evidence as to the time of the laying of the pipes, as to the cause of the leak, or as to whether a nuisance was created: Municipal Corporations Act, 1933, s. 245 (use of word "may").

In the absence of negligence, the defendant is protected by the defence of statutory authority and is not liable for nuisance
 35 resulting from its works without negligence: *Salmond on Torts*, 9th Ed. 47-51, 595, 606; *Geddis v. Proprietors of Bann Reservoir*(21); *Blyth v. Birmingham Waterworks Co.*(22); *Snook v. Grand Junction Waterworks Co.*(23); and *Green v. Chelsea*

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| (11) [1927] N.Z.L.R. 392, 405, 406; | (17) (1881) 6 App. Cas. 193, 213. |
| G.L.R. 235, 242. | (18) (1895) 1 Ch. 287, 296. |
| (12) [1895] 1 Ch. 287, 296, 297, 298, | (19) (1896) 15 N.Z.L.R. 483, 485. |
| 310. | (20) (1916) 21 C.L.R. 181, 188, 193. |
| (13) (1881) 6 App. Cas. 193, 213. | (21) (1878) 3 App. Cas. 430, 455-56. |
| (14) (1896) 15 N.Z.L.R. 483. | (22) (1856) 11 Exch. 781, 785; 156 |
| (15) (1916) 21 C.L.R. 181, 188. | E.R. 1047, 1049. |
| (16) (1905) 2 K.B. 597, 609. | (23) (1886) 2 T.L.R. 308. |

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Waterworks Co.(24), which was approved in *Charing Cross Electrical Supply Co., Ltd. v. Hydraulic Power Co., Ltd.*(25), show that the doctrine of *Rylands v. Fletcher* cannot be extended to apply to water corporations and local bodies in the like position. *Green's* case was approved in *Charing Cross Electrical Supply Co. v. Hydraulic Power Co.*, but was distinguished on the facts(26); *Hammersmith and City Railway Co. v. Brand*(27); *Ayr Harbour Trustees v. Oswald*(28); *National Telephone Co. v. Baker*(29); *East Fremantle Corporation v. Annois*(30); *Robinson on Public Authorities and Legal Liability*, 171; *Markland v. Manchester Corporation*(31); *Renahan v. Vancouver*(32); *Ferguson v. Municipality of Claremont*(33); and *8 Halsbury's Laws of England*, 2nd Ed. 108 (h), 23, 623, 624 (k), 26, 257, 27, 495. *Midwood's* case(34) was applied in *Farnworth v. Manchester Corporation*(35).

The defendant is not liable under s. 173 of the Municipal Corporations Act, 1933. *Green v. Chelsea Waterworks Co.*(36) was not referred to either in the argument or in the judgment in *Midwood and Co.'s* case(37), but was referred to and distinguished in *Charing Cross Co.'s* case(38). The distinction between these two classes of authority is one of construction: see *8 Halsbury's Laws of England*, 2nd Ed. 108-109, 26, 258; *Farnworth v. Manchester Corporation*(39); *North-western Utilities, Ltd. v. London Guarantee and Accident Co., Ltd.*(40); *Winfield on Torts*, 518; *East Fremantle Corporation v. Annois*(41); and *Craies on Statute Law*, 4th Ed. 248. In *Midwood and Co.'s* case, the *Charing Cross* case, and *Farnworth's* case, liability for the creation of a nuisance was preserved by statute, but there was no special provision for compensation (in the strict sense of the word, as opposed to damages) such as is made by the statutes. The position in New Zealand is different, and is more in accordance with what was said in *Farnworth's* case(42): see s. 171 of the Municipal Corporations Act, 1933. If the question at issue is purely one of construction, then the matter has been settled in New Zealand by the Supreme Court and the Court of Appeal.

(24) [1894] 70 L.T. 547, 548.

(25) [1914] 3 K.B. 772.

(26) *Ibid.*, 781.

(27) (1869) L.R. 4 H.L. 171, 196, 197.

(28) (1883) 8 App. Cas. 623.

(29) [1893] 2 Ch. 186, 203.

(30) [1902] A.C. 213, 217.

(31) [1934] 1 K.B. 566, 557-58, 582, 583; aff. on app. [1936] A.C. 360.

(32) [1930] 4 D.L.R. 1018.

(33) [1928] W.A.L.R. 117.

(34) [1905] 2 K.B. 597.

(35) [1929] 1 K.B. 533, 540, 545, 559; var. on app. [1930] A.C. 171.

(36) (1894) 70 L.T. 547.

(37) [1905] 2 K.B. 597.

(38) [1914] 3 K.B. 772, 781.

(39) [1929] 1 K.B. 533, 540, 545, 559; var. on app. [1930] A.C. 171.

(40) [1936] A.C. 108, 119, 120.

(41) [1902] A.C. 213, 218.

(42) [1929] 1 K.B. 533, 559.

A local authority acting in exercise of statutory powers, which it has not exceeded, is not liable in an action for damages (even though it may have proceeded negligently or improperly in the design or in the mode of constructing a public work, and have
 5 thereby caused damage to the property of others); the only remedy is a claim for compensation under the Public Works Act: *Grey County v. Frankpitt*(43); *Palmerston North Borough v. Fitt*(44); *Farrelly v. Pahiatua County*(45); *Lyttle v. Hastings Borough*(46), where the previous cases are referred to; and also
 10 *Colac Corporation v. Summerfield*(47); *Raleigh Corporation v. Williams*(48); and *Charing Cross case*(49); and see *Lyttle's case*(50) (following *Bank of New Zealand v. Blenheim Borough*(51)), that "nuisance" in s. 150 of the Municipal Corporations Act, 1908 (now s. 173 of the 1933 statute), means
 15 "public nuisance"; and *Robinson on Public Authorities and Legal Liability*, 211. It was also decided that "nuisance" means "public nuisance" in the following cases: *Fortescue v. Te Awamutu Borough*(52); *O'Brien v. Wellington City Corporation*(53); and *Kirkcaldie v. Wellington City Corporation*(54). It has, therefore,
 20 been decided in New Zealand that the word "nuisance" in s. 173 means "public nuisance"; and that the only remedy open to a person who has suffered damage by the exercise by a local authority of its statutory powers is by way of compensation as provided in s. 171 of the Municipal Corporations Act, 1933.
 25 And see, also, *Howe v. Point Dalhousie*(55) and *Spratt v. Township of Gloucester*(56). The judgment in *Sargood v. Dunedin Corporation*(57) was founded on negligence, and there was no suggestion of liability on the basis of *Rylands v. Fletcher*. Section 228 of the Municipal Corporations Act, 1876, was therefore available. As
 30 to acts of non-feasance, see *St. Kilda Borough v. Smith*(58) and *Green v. Chelsea Waterworks Co.*(59). There is here no evidence as to when the pipes were laid, the cause of their leaking, or that a nuisance was thereby created.

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| (43) (1899) 18 N.Z.L.R. 111, 114; 1 | (52) [1920] N.Z.L.R. 281, 288, 290 |
| G.L.R. 217, 218. | 300-301; G.L.R. 214, 217 |
| (44) (1901) 20 N.Z.L.R. 396, 404, | 218, 224. |
| 405; 4 G.L.R. 4, 7, 8. | (53) [1928] N.Z.L.R. 215, 216, 218, |
| (45) (1903) 22 N.Z.L.R. 683, 684, | 220; [1925] G.L.R. 129, |
| 688, 689; 5 G.L.R. 294, 295. | 130, 131, 132. |
| (46) [1917] N.Z.L.R. 910, 912, 913, (54) [1933] N.Z.L.R. 1101, 1114, | 1115; G.L.R. 719, 726. |
| 918; G.L.R. 553, 556. | |
| (47) [1893] A.C. 187, 191. | (55) [1929] 1 D.L.R. 585, 587. |
| (48) [1893] A.C. 540. | (56) (1920) 54 D.L.R. 275. |
| (49) [1914] 3 K.B. 772. | (57) (1888) 6 N.Z.L.R. 489. |
| (50) [1917] N.Z.L.R. 910, 916, 917; (58) (1902) 21 N.Z.L.R. 205, 208; 4 | G.L.R. 342, 343. |
| G.L.R. 553, 555, 556. | |
| (51) (1885) N.Z.L.R. 4 S.C. 10. | (59) (1894) 70 L.T. 547. |

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If the onus is on the plaintiff, there has so far been no opportunity for its discharge: this Court is asked for a declaration on a question of law, whether "nuisance" means "public nuisance" or includes "private nuisance."

In order to justify a claim for compensation, there must be damage to land: *The Queen v. Metropolitan Board of Works*(60); *Handley v. Minister of Public Works*(61); *Russell v. Minister of Lands, Sainsbury v. Minister of Lands*(62); *Hone te Anga v. Kawa Drainage Board*(63); and *Wood v. Taranaki Electric-power Board*(64). It is a purely fortuitous circumstance that the damage in this case was to goods. The same principle would be involved had the damage been to the premises. In either case the time for making a claim would long since have expired: *Palmerston North Borough v. Fitt*(65); *Colac Corporation v. Summerfield*(66), referred to in *Farrelly's case*(67) and in *Fortescue's case*(68). 5 10 15

The principles applicable to a supply of electricity, not yet in its final stage of development, are not applicable to a water-supply, as the questions of public convenience there arises: see *Midwood and Co.'s case*(69); *Hammersmith and City Railway Co. v. Brand*(70); and *Ayr Harbour Trustees v. Oswald*(71). 20

As to *Rylands v. Fletcher*: this is a revival in a special type of case of the old doctrine of absolute ability—*Winfield on Torts*, 518—and the doctrine may be excluded by statute, according to the construction of a particular statute: contrast *Green v. Chelsea Waterworks*(72) (no liability) and *Charing Cross Electrical Supply Co. v. Hydraulic Power Co.*(73) (liability under the Reservoirs (Safety) Provisions Act, 1930 (Eng.), 23 *Halsbury's Complete Statutes of England*, 762). 25

As to the Court of Appeal being bound by its own decisions, 30 see (1933) 9 *New Zealand Law Journal*, 277, 293, and the *Charing Cross case*(74).

Brash, in reply. The observations of *Stout*, C.J., and *Hosking*, J., in *Fortescue v. Te Awamutu Borough*(75) (a clear

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| (60) (1869) L.R. 4 Q.B. 358. | (68) [1920] N.Z.L.R. 281, 300; |
| (61) (1914) 16 G.L.R. 683, 685. | G.L.R. 214, 224. |
| (62) (1898) 17 N.Z.L.R. 241, 250; 1 | (69) [1905] 2 K.B. 597, 605, 606, 610. |
| G.L.R. 15, 16. | (70) (1869) L.R. 4 H.L. 171, 196, |
| (63) (1914) 33 N.Z.L.R. 1139; 16 | 197. |
| G.L.R. 696. | (71) (1883) 8 App. Cas. 623, 634. |
| (64) [1927] N.Z.L.R. 392, 404, 406; | (72) (1894) 70 L.T. 547. |
| G.L.R. 235, 241, 242. | (73) [1914] 3 K.B. 772. |
| (65) (1901) 20 N.Z.L.R. 396, 406; | (74) [1914] 3 K.B. 772, 778, 783. |
| 4 G.L.R. 4, 8. | (75) [1920] N.Z.L.R. 281; G.L.R. |
| (66) [1893] A.C. 187, 190, 192. | 214. |
| (67) (1903) 22 N.Z.L.R. 683, 689; 5 | |
| G.L.R. 294, 295. | |

case of non-feasance wherein reference to the nuisance clause was unnecessary) were mere *dicta*, as are also the statements in the other New Zealand cases cited and relied on by the respondent. As to the question of public convenience, see *Kerr on Injunctions*, 5 6th Ed. 151; *Salmond on Torts*, 9th Ed. 240; and *Robinson on Public Authorities and Legal Liability*, 172, 210. In *Green's* case there was no nuisance clause, and there was a duty cast on the Corporation to continue the water-supply; here, the power is permissive.

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Cur. adv. vult.

MYERS, C.J. The plaintiff's action is based solely upon nuisance, and, if the defendant's contention is sound that the plaintiff is required in law to prove negligence in order to succeed, then obviously the claim must fail.

15 The action came before me for trial in the Supreme Court at Dunedin on February 10, 1939. One witness was called on behalf of the plaintiff, and certain admissions were made on both sides as appears from the printed case. The defendant called no evidence. Mr. *Brash* then proceeded with his argument on the 20 law, but before he had gone very far it appeared probable that there was a sharp conflict between English and New Zealand decisions or *dicta* and that the Court would be invited to hold either that the New Zealand decisions or *dicta* were wrong, or, alternatively, that they could be distinguished in the plaintiff's 25 favour. It was suggested that in these circumstances it was desirable that the case should be removed direct into the Court of Appeal for argument, and, Mr. *Haggitt* for the defendant not consenting but not opposing, that course was accordingly ordered.

I think I ought to say at this stage—and I shall later indicate 30 my reasons—that after careful examination of all the authorities I feel satisfied that the precise point which falls for determination here has not been decided or even considered in any of the previous New Zealand cases.

Just exactly when the water-pipes were laid by the defendant 35 Corporation does not appear, but it has not been suggested that anything turns on that point. In each principal Municipal Corporations Act ever since 1876 a municipal Corporation has had power to construct waterworks and supply water. In the 1876 Act and each of the several subsequent Consolidation Acts there 40 has been contained a "nuisance clause." The nuisance clause in the Acts of 1876 and 1886 applied, however, only in respect of drainage, but in the Municipal Corporations Act, 1900 ("an Act

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"to consolidate and amend the Laws relative to Municipal "Corporations"), and in every subsequent enactment consolidating and amending the law relating to Municipal Corporations, the nuisance clause has applied to all "public works" generally. The present provision is s. 173 of the Municipal Corporations Act, 1933, which is as follows:— 5

Nothing in this Act shall entitle the Council to create a nuisance, or shall deprive any person of any right or remedy he would otherwise have against the Corporation or any other person in respect of any such nuisance.

I do not understand it to be disputed that this nuisance clause 10 (whatever its effect may be) applies to the Corporation's waterworks. Section 173 is contained in Part XVII of the Act dealing with public works generally. Section 168 empowers the Council, *inter alia*, to take lands which may be necessary or convenient for the purpose of or in connection with any "public work" 15 which the Council is empowered to undertake, construct, or provide, or for carrying out any of the purposes of the Act; and to erect, construct, and maintain any "public work" which in the opinion of the Council may be necessary or beneficial to the borough. "Public work" is defined by s. 2 of the Municipal 20 Corporations Act, 1933, as including any public work within the meaning of the Public Works Act, 1928, and by s. 2 of the last-mentioned Act "public work" is defined as meaning and including, *inter alia*, every work which any local authority is authorized to undertake under that or any other Act. Except 25 in one respect, which will be mentioned later and which does not affect the main point here, the provisions of the Public Works Act (which deals mainly with Government works) do not affect this case.

By the definition of "waterworks" in s. 244 (1) of the 30 Municipal Corporations Act, 1933, the term includes "pipes" . . . and appliances of every kind constructed by the "Council under the authority of this Act for collecting or conveying water" The special power to construct waterworks is conferred by s. 245, but waterworks and all the other 35 different classes of works which a municipal Corporation is authorized by special provisions of the Municipal Corporations Act to construct are "public works" within Part XVII of the Act, and the nuisance clause, whatever its meaning and effect may be, applies to them all. An immediate distinction, therefore, 40 arises between the present case and such cases as *Green v. Chelsea Waterworks Co.*(1), inasmuch as there was not in the statutes

which there fell for consideration, nor does there appear to be in the English Waterworks Clauses Act, 1847, any nuisance clause. On the other hand, the position in New Zealand is similar to that in England under the London Hydraulic Power Acts which fell for consideration in *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*(2), in which Acts there was a nuisance clause. I shall refer later to the New Zealand authorities, and I shall show that (subject to certain comments which I shall have to make) there have been only two decisions, in each case by a single Judge, dealing with the construction of the nuisance clause. There have been *obiter dicta* by other Judges, the original dictum being that of *Prendergast, C.J.*, as far back as 1885 in *Bank of New Zealand v. Blenheim Borough*(3). There have also been certain dicta in the Court of Appeal, but that Court has never been called upon to decide the meaning and effect of the nuisance clause. So far, therefore, as this Court is concerned, it is free to interpret the section in accordance with its own opinion as to the true construction; and notwithstanding the great reputation of the learned Judge on whose dictum the subsequent decisions were based and the eminence of the learned Judges who followed that dictum, and although as a Judge of the Supreme Court I should, of course, be bound by them, I feel, with the most profound respect for the opinions of the earlier Judges, that if, as a Judge of this Court, I come to the conclusion that the section has been erroneously construed in the past it is my duty to say so.

But we are told: *stare decisis*. To that suggestion there are several answers. First, as it seems to me, and as I have already said, the precise point in this case has never been decided or considered in any of the previous New Zealand cases; and, even in the cases in which it is said the construction of s. 173 (or rather its predecessor) has been the subject of express decision, it seems to me that any statements that s. 173 refers only to public nuisances—and it is those statements upon which the defendant here relies—were unnecessary to the decision in any of the cases before the Court, and must, therefore, be regarded as nothing more than mere *obiter dicta*. Secondly, this case is not like a decision on a conveyancing question which has been consistently acted upon and in reliance upon which titles have been accepted. Thirdly, if the *stare decisis* principle is acted upon, the result would be that the plaintiff has suffered damage for which he has no remedy and for which he would have had no remedy in anticipation by compensation. My reason for saying this will

(2) [1914] 3 K.B. 772.

(3) (1885) N.Z.L.R. 4 S.C. 10.

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be given later. Fourthly, the first case in which it can be argued that the construction of the section was the subject of actual decision was only in 1917. In *Robinson Brothers (Brewers), Ltd. v. Durham County Assessment Committee*(4) the House of Lords did not hesitate to overrule a decision of a Divisional Court which had stood for forty years and had regulated the practice of rating during that period, upon the grounds that the decision was erroneous in law and its operation was unjust. That judgment of the House of Lords is, in my opinion, clear authority for saying that this Court, in the present case, is not bound by the principle of *stare decisis*. 5 10

Then it is said that inasmuch as, since the *decisions* of two Judges of the Supreme Court, the Legislature has consolidated and amended the Municipal Corporations Act on more than one occasion and has re-enacted the nuisance clause without amendment, it must be deemed to have accepted and acted upon the interpretation placed by the Court upon the section. I italicise the word "decisions" because, as I shall endeavour to show later, the statement relied upon by the defendant in this case, when carefully examined, cannot be regarded as decisions at all. The argument is based upon various authorities, including a statement by *Griffith, C.J.*, in *D'Emden v. Pedder*(5), approved by *Lord Halsbury* when delivering the judgment of the Privy Council in *Webb v. Outtrim*(6), and quoted by *Lord Blanesburgh* in *Barras v. Aberdeen Trawling and Fishing Co., Ltd.*(7): "When 15 20 25
"a particular form of legislative enactment, which has received
"authoritative interpretation, whether by judicial decision or
"by a long course of practice, is adopted in the framing of a later
"statute, it is a sound rule of construction to hold that the words
"so adopted were intended by the Legislature to bear the meaning
"which has been so put upon them"(8). But that that state- 30
ment can be carried too far is shown by the judgment in *Robinson Brothers (Brewers), Ltd. v. Durham County Assessment Committee*(9).

In the present case no argument can be based upon what *Prendergast, C.J.*, said in 1885, because that was not an authoritative interpretation but merely an *obiter dictum*. It was not until 1917 that the interpretation of the section was first considered in an actual decision. Consequently, the principle relied upon by the defendant cannot apply to any consolidation—and 35 40

(4) [1938] A.C. 321.

(5) (1904) 1 C.L.R. 91.

(6) [1907] A.C. 81, 89.

(7) [1933] A.C. 402, 432.

(8) (1904) 1 C.L.R. 91, 110.

(9) [1938] A.C. 321.

there were several—prior to 1917, when *Lyttle v. Hastings Borough*(10) was decided by *Edwards, J.* In 1920 a consolidating Municipal Corporations Act was passed, reproducing the nuisance clause unaltered. Then came a decision of *Stout, C.J.*, in 1924, 5 in *O'Brien v. Wellington City Corporation*(11), and in that case the learned Chief Justice, referring to the decision of *Edwards, J.*, in 1917, said: "That case seems to me directly in point, "but counsel for the plaintiff contended that that case was "wrongly decided. I am of opinion that I must treat that 10 "decision as binding on me, and if it is to be upset, leaving it to "the Court of Appeal to do so, because that decision has been "enacted upon and assumed to be the law in New Zealand for "many years"(12). I shall discuss *O'Brien's* case later, as well as *Lyttle's* case; but at the moment I simply cite the passage 15 to show that *Stout, C.J.*, regarded the matter as one where it was open to the Court of Appeal to reverse his own then decision and the decision in 1917 which he was following. Following the passage that I have cited, the learned Chief Justice said: "Nor "are there any English cases that can be quoted showing that that 20 "decision [*i.e.*, the New Zealand decision in 1917] is wrong"(13). That statement certainly does not appear to be correct. At the time when it was made, there were certainly two, and I think no fewer than four, decisions of the English Court of Appeal, to which I shall refer later, directly contrary to the New Zealand decision 25 or dictum in 1917 to the effect (as interpreted by *Stout, C.J.*) that the nuisance clause refers only to public nuisances, which decision or dictum the Chief Justice purported to follow. Later on, in August, 1933, there was a dictum of *Ostler, J.*, to which also I shall refer later. Then on December 20, 1933, there was enacted 30 by the Legislature the Municipal Corporations Act at present in force, the title to which was "An Act to consolidate and amend "certain Enactments of the General Assembly relating to "Municipal Corporations," and that Act includes as s. 173 the previous nuisance clause unaltered. I do not think that in all 35 these circumstances the case comes within that portion of the judgment of *Lord Macmillan* (concurring in by the other learned Lords) in *Robinson Brothers (Brewers), Ltd. v. Durham County Assessment Committee*(14): "I recognize that where a term or "expression which has an established judicial connotation occurs 40 "in a statute Parliament may well be taken to have employed "it in conformity with this usage"(15). If I am right in saying,

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(10) [1917] N.Z.L.R. 910; G.L.R. (12) *Ibid.*, 220; 132.

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(13) *Ibid.*, 220; 132.

(11) [1928] N.Z.L.R. 215; [1925] (14) [1938] A.C. 321.

G.L.R. 129.

(15) *Ibid.*, 340.

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first, that the precise point which falls for determination in the present case never arose in any of the decided cases and therefore has not been the subject of judicial consideration, and, secondly, that there never has been a "decision" that s. 173 of the Municipal Corporations Act refers only to public nuisances, but only obiter dicta to that effect, it does not seem to me that the principle contended for should avail the defendant, as mere obiter dicta do not amount to "established judicial connotation" or "authoritative interpretation by judicial decision."

It is clear that if a statute confers upon a local body the power to construct, operate, and maintain a public work, the proper exercise of which power may occasion a nuisance, and such nuisance is thereby created, no action lies against the public body in respect of such nuisance. This has been clearly settled by a long line of authorities, and the legal position is the same whether the right to compensation has or has not been given to persons who suffer injury. It is not necessary to cite numerous authorities. It is sufficient to refer to *London, Brighton, and South Coast Railway Co. v. Truman*(16) and *Green v. Chelsea Waterworks Co.*(17). I refer to the last-mentioned case because of its similarity, so far as the facts are concerned, to the case now under consideration. It was the case of a waterworks company, one of whose mains had burst, with the result that water flooded the plaintiff's premises, causing considerable damage. The company was authorized by Act of Parliament to lay the main, and it was held that in the absence of negligence the company was not liable in damages. But in all the English cases (including *Green's* case) where the undertaking authority has been held not liable for nuisance there was no nuisance clause. Therein lies the distinction (except in so far as the matter may be affected by the New Zealand authorities) between the English cases relied upon by the Corporation here and the present case.

That distinction brings me to a consideration of the interpretation of s. 173, and I propose to consider it as if it were *res integra* and first to consider it by itself and then in conjunction with the compensation provisions of the statute.

It is suggested that the section refers to a public nuisance only and does not include a private nuisance. But why? I may say in passing that the Public Works Act, 1928, does not, nor did any previous Public Works Act, so far as I am aware, contain a nuisance clause. Section 173 certainly is not in terms limited to public nuisances. On the contrary, if the golden rule

(16) (1885) 11 App. Cas. 45.

(17) (1894) 70 L.T. 547.

- of construction is to be applied, and the words are to be given their primary and ordinary meaning, the section includes all nuisances, whether public or private. The suggestion is that the words "or shall deprive any person of any right or remedy he
- 5 "would otherwise have against the Corporation or any other "person in respect of any such nuisance" give a right only to a person who sustains some special injury by reason of a public nuisance beyond that suffered by the general public. I can see no force in that suggestion. My own view is that the additional
- 10 words are if anything more appropriate to the conferring of a right to damages in respect of a private nuisance. That the nuisance clause must be construed with some limitation I admit at once, and with that aspect of the case I will deal later. As I have already pointed out, s. 173 is not limited to waterworks, but
- 15 is to be read in conjunction with s. 168 and applies to all public works. Remembering this, it cannot be the case that "nuisance" in s. 173 could be construed as being referable without modification to every public nuisance. I say this because there are various kinds of authorized public works the construction and maintenance
- 20 of which necessarily involve the creation and existence of a public nuisance. This observation applies, for example, to any public work which involves the use of electric power, or the erection of poles or obstructions in streets and other places. It probably and almost certainly applies to the construction and maintenance
- 25 of sewerage or drainage systems, septic tanks, &c. It would also, where water-mains are laid under private lands, as they may be in certain circumstances or under certain conditions, apply to the existence of the mains or pipes. The statutory authority conferred upon a local body to construct and maintain such works
- 30 necessarily therefore includes authority for the creation and existence of such necessary nuisances. If, then, s. 173 is to be read as referable to public nuisances without modification, it would be in hopeless conflict with the statutory provisions authorizing the construction and maintenance of the public work.
- 35 With the greatest respect and deference to those who have thought and may now think that s. 173 applies only to public nuisances, I would say that as a matter of construction I see no reason why that should be so, and every reason for interpreting the word "nuisance" in its ordinary meaning of nuisance, public or private,
- 40 subject, however, to the modification which I shall mention later. I should say then that, leaving out of consideration for the time being the existence and effect of any compensation clause—that is to say, considering for the moment merely the authorizing

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provisions of the statute and s. 173—the latter provision, while applying to public and private nuisances alike, would not apply to what may be called a necessary nuisance. That is to say, the authorizing provisions authorize what may be called necessary nuisances such as those I have already mentioned, for which nuisances no action would lie against the local authority, but the local authority would remain liable in respect of any other nuisance, whether public or private. That seems to have been the view taken by *Griffith, C.J.*, in *Fullarton v. North Melbourne Electric Tramway and Lighting Co., Ltd.*(18).

But then comes the compensation clause, s. 171, which is as follows :—

Every person having any estate or interest in any lands taken under the authority of this Act for any public works, or injuriously affected thereby, or suffering any damage from the exercise of any of the powers hereby given, shall be entitled to full compensation for the same from the Corporation. Such compensation may be claimed and shall be determined in the manner provided by the Public Works Act, 1928.

This provision is substantially the same as s. 42 (1) of the Public Works Act, 1928. The present case, however, must be determined not under the provisions of the Public Works Act, but under those of the Municipal Corporations Act. The Public Works Act (in which as already stated there is no nuisance clause) is applicable only, with the decisions upon it, for assistance in ascertaining the extent of the compensation which may be claimed and awarded. Now, although it would appear that in England—*Knock v. Metropolitan Railway Co.*(19)—compensation may be awarded to a claimant under the Railway Clauses Consolidation Act, 1845, not only for structural damage and depreciation in value of his premises but also for damage occasioned to goods therein during the construction of an authorized work, though apparently not subsequently arising from user of the work, it has been well established in New Zealand that compensation can be awarded only for land taken and for injurious affection to land, or estates or interests in land. The question as to the extent of compensation that may be claimed and awarded must depend upon the interpretation of the particular enactment or enactments authorizing the work and providing for compensation. Of course, if a nuisance is authorized as a necessary nuisance and its existence involves injurious affection to land, the owner of such land is entitled to compensation: *Fitzgerald v. Kelburne and Karori Tramway Co.*(20), where it was said that our Legislature in the Public Works Acts has departed from the narrower measure of

(18) (1916) 21 C.L.R. 181, 188.

(19) (1868) L.R. 4 C.P. 131.

(20) (1901) 20 N.Z.L.R. 406; 4 G.L.R. 42.

damage defined in *Hammersmith and City Railway Co. v. Brand*(21) as recoverable under the English Lands Clauses and Railways Clauses Consolidation Acts. But it is clear that in the present case the plaintiff could not have claimed compensation: 5 and this for two reasons. First, because a claim can only be made in respect of land taken or injury to land, and no claim for compensation lies in respect of probable or possible damage to goods; and, secondly, the possibility of damage resulting by reason of water escaping from the mains under the street into the 10 basement of premises adjoining the street would be too improbable, speculative, and remote a ground to form the subject of compensation: *Wood v. Taranaki Electric-power Board*(22). What was said in *Wood's* case might, I suggest, be interpreted in this way: that compensation for nuisance does not lie in respect of 15 anything but a "necessary" and authorized nuisance. In other words, s. 173, taken in conjunction with the compensation clause—s. 171—leaves the Corporation liable in respect of any nuisance which is not a necessary nuisance and which would not found a claim for compensation under the compensation section of the 20 Act.

I come now to a consideration of the authorities, and I shall refer to the English authorities first. The first of the four that I have in mind was in 1894—nine years after the dictum of *Prendergast, C.J.*, already referred to. The case in question is 25 *Shelfer v. City of London Electric Lighting Co.*(23), where the defendant company was empowered, for the purpose of supplying electricity, to construct such works and do all such things as were necessary and incidental to such supply. The company's authorizing order, which was confirmed by statute, contained a 30 clause, as follows:—

Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them.

True, these words are not precisely the same as the words of s. 173 35 of the Municipal Corporations Act, 1933, but there would be just as much reason, in my opinion, for saying that the English clause refers only to public nuisances as the New Zealand section. Indeed, the very point seems to have been raised in argument in one of the English cases—*Jordeson v. Sutton, Southcoates, and* 40 *Drypool Gas Co.*(24)—and rejected(25). *Kekewich, J.*, in *Shelfer's* case(26) held that the strongest view on behalf of the

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(21) (1869) L.R. 4 H.L. 171.

(22) [1927] N.Z.L.R. 392, 405, 406;
G.L.R. 235, 242.

(23) [1895] 1 Ch. 287.

(24) [1899] 2 Ch. 217.

(25) *Ibid.*, 226.

(26) [1895] 1 Ch. 287, 297.

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company was that nuisances other than those which were reasonably necessary were not allowed. This view was confirmed by a very strong Court of Appeal, consisting of *Lord Halsbury* and *Lindley* and *A. L. Smith*, L.JJ.(27). True, in that case there was provision for compensation, which, however, was held to be limited to the execution of the works and did not apply to their user when constructed. But the fact that under the New Zealand Act, in the cases where compensation can be claimed for injurious affection, the claimant is entitled to compensation in respect of user as well as the construction of the works, though it forms a distinction from *Shelfer v. City of London Electric Lighting Co.*, is not a distinction in principle. The principle must, I think, be the same. The only difference is that in the New Zealand cases the nuisances for which the Corporation may be liable are more limited, in that the nuisances for which compensation may be claimed, and which therefore do not come within the class for which the Corporation is made liable under s. 173, are wider in scope than under the English provision, where, as in *Shelfer's* case, the compensation clause was held to be confined to construction of the works and not to extend to their subsequent user.

The next case is *Jordeson v. Sutton, Southcoates, and Drypool Gas Co.*(28), where it was held by the Court of Appeal that the defendant company had no statutory authority so to construct its works as to occasion a nuisance, and that the nuisance clause expressly preserved its liability for nuisance, thus distinguishing the case from *Truman's* case(29). The clause there was as follows :

Nothing in this or the special Act shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them.

Then followed *Midwood and Co., Ltd. v. Manchester Corporation*(30). The defendant Corporation was empowered by an order made under the Electric Lighting Acts and confirmed by Act of Parliament to supply electrical energy in their district, and for that purpose to lay down electric mains, but there was a nuisance clause similar to that in *Jordeson's* case(31). One of the Corporation's mains fused, and the bitumen in which the main was laid in consequence became volatilized into an inflammable gas, which accumulated for some time, and then exploded, causing a fire by which the plaintiff's goods were damaged. It was held that, apart from any question of negligence, the defendant

(27) [1895] 1 Ch. 287, 308.

(30) [1905] 2 K.B. 597.

(28) [1899] 2 Ch. 217.

(31) *Supra*, l. 28.

(29) (1885) 11 App. Cas. 45.

Corporation was liable to the plaintiffs as for a nuisance by reason of the provisions of the nuisance clause.

Then came another decision of the Court of Appeal in 1914 in *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*(32).

- 5 That case is interesting in the light of the present case because it was what may be called a waterworks case. The facts, as taken from the headnote, are that the plaintiffs were the owners of electric cables which had been laid under certain public streets. The defendants were the owners of hydraulic mains which had
- 10 been laid under the same streets under statutory powers. These mains burst in four different places, in each case damaging the plaintiff's cables.. The bursting of the mains was not due to any negligence on the part of the defendants. Two of the mains which had so burst had been laid under a private Act which did
- 15 not contain the usual clause providing that nothing in the Act should exempt the company from liability for nuisance. The other two had been laid under a later Act which did contain such a clause. The later Act also provided that the two Acts should be "read and construed together as one Act." It was held (i),
- 20 following *Midwood's* case(33), that the doctrine of *Rylands v. Fletcher*(34) applies not only to cases in which the dangerous thing has escaped from the defendant's land on to the plaintiff's land and done damage there, but also to cases in which the site of the plaintiff's injury was occupied by him only under a license and
- 25 not under any right of property in the soil, and that in the absence of statutory authorization of the nuisance the defendants were liable for the damage caused by the bursting of their main, notwithstanding that they had been guilty of no negligence. (ii) That the effect of the two Acts being read together as one
- 30 Act was to take away the privilege which, down to the passing of the later Act, the defendants had enjoyed, in respect of the two first-mentioned mains, of not being liable for damage done by their bursting in the absence of negligence, and that consequently in the case of all four of the mains the defendants were liable as
- 35 for a nuisance. The Court in this case consisted of *Lord Sumner*, *Kennedy*, L.J., and *Bray*, J. The nuisance clause was in the same terms as in the *Jordeson* case(35). It does not appear in the cases, other than *Shelfer's* case(36), whether or not there was provision for compensation, but, as I have said, that, in my
- 40 opinion, does not affect the principle, but only the extent, in the case of both public and private nuisances alike, to which

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(32) [1914] 3 K.B. 772.

(33) [1905] 2 K.B. 597.

(34) (1868) L.R. 3 H.L. 330.

(35) *Ante*, p. 68, l. 28.

(36) [1895] 1 Ch. 287.

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the undertaker may be immune from damages. But for the existence of the nuisance clause, it would appear that the case must have been decided differently—that is to say, in the same way as *Green v. Chelsea Waterworks Co.*(37), and the plaintiffs could not have succeeded in the absence of proof of negligence. 5

Midwood's case(38) and the *Charing Cross Electricity Supply Co.'s case*(39) have been approved by the Privy Council in a judgment delivered by *Lord Wright* in *North-western Utilities, Ltd. v. London Guarantee and Accident Co., Ltd.*(40), and what the learned Lord said there effectively distinguished *Green v. Chelsea Waterworks Co.*(41) from such cases as the one now under consideration. He said that in respect of liability for nuisance, or that form of liability which is analogous to a liability for nuisance, the rule of strict liability has been modified by admitting as a defence that what was being done was properly done in pursuance 15 of statutory powers and the mischief that has happened has not been brought about by any negligence on the part of the undertakers(42). And he says that, as an illustration of this well-known doctrine, reference may be made to *Green v. Chelsea Waterworks Co.*(43), where *Lindley, L.J.*, said of *Rylands v. Fletcher*: “That case is not to be extended beyond the legitimate “principle on which the House of Lords decided it. If it were “extended as far as strict logic might require, it would be a very “oppressive decision”(44). But I assume from the later authorities that *Green v. Chelsea Waterworks Co.* must have been differently 25 decided had there been a nuisance clause in the statute. *Lord Wright* says: “Where undertakers are acting under statutory “powers it is a question of construction, depending on the “language of the statute, whether they are only liable for “negligence or whether they remain subject to the strict and 30 “unqualified rule of *Rylands v. Fletcher* (L.R. 3 H.L. 330). Thus “in *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* ([1914] 3 K.B. 772), it was held (following the previous “decision in *Midwood and Co., Ltd. v. Manchester Corporation* “([1905] 2 K.B. 597), that the defence of statutory authority 35 “was limited by a clause in the statutory order providing that “nothing therein should exonerate the Corporation from liability “for nuisance”(45). Again in the Court of Appeal in *Collingwood v. Home and Colonial Stores, Ltd.*(46), *Lord Wright, M.R.*, refers

(37) (1894) 70 L.T. 547.

(38) [1905] 2 K.B. 597.

(39) [1914] 3 K.B. 772.

(40) [1936] A.C. 108, 119, 120.

(41) (1894) 70 L.T. 547.

(42) [1936] A.C. 108, 119.

(43) (1894) 70 L.T. 547.

(44) *Ibid.*, 549.

(45) [1936] A.C. 108, 120.

(46) [1936] 3 All E.R. 200.

to *Midwood's* case, the *Charing Cross Electricity Supply Co.'s* case, and the *North-western Utilities, Ltd.'s*, case, and he points out that the principle of *Rylands v. Fletcher* has been applied—of course, in each case there was a nuisance clause—to persons who carry gas, water, or electricity in their property or in their mains in bulk and in large quantities(47). The position seems to me to be well summed-up by *Griffith, C.J.*, in *Fullarton's* case(48), where he says: "In the case of undertakings such as railways, tramways, telegraphs, or telephones, it is obvious that the authorized works cannot be carried out without doing many things that are nuisances at common law, such as the erection of posts and laying of rails on highways and stretching wires above them. Such nuisances must be taken to be authorized. The question whether the nuisance complained of in any particular case is authorized by the general words of the authority may often arise, and may be difficult to determine. In order to obviate this difficulty a practice arose in England of providing in the enabling Act that nothing in the Act should exempt the undertakers from liability for nuisance. See, for instance, the case of *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.* ([1914] 3 K.B. 772). Such a clause would not, of course, apply to what may be called a necessary nuisance. Oftener the same result was obtained by inserting a provision to the same effect in the order authorizing the construction of the works, as in *Midwood and Co. v. Manchester Corporation* ([1905] 2 K.B. 597)"(49).

I come now to the New Zealand authorities. First of all, there is the obiter dictum, for it is no more than that, of *Prendergast, C.J.*, in *Bank of New Zealand v. Blenheim Borough*(50). That was a proceeding for an injunction claiming to restrain the defendant Corporation from making an open drain through the land of the plaintiff, and an injunction was granted upon the ground that the proposed works were not authorized by the statute—namely, the Municipal Corporations Act, 1876. During the course of his quite short judgment the learned Chief Justice referred to the nuisance clause in the Act and to the contention made by the plaintiff that that provision applied as well to private as to public nuisances. All that the learned Chief Justice said was this: "I am inclined to think that it is intended to prohibit only public nuisances, and not such injuries as are general nuisances simply; this must be so if provision

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(47) *Ibid.*, 208.

(48) (1916) 21 C.L.R. 181.

(49) *Ibid.*, 188.

(50) (1885) N.Z.L.R. 4 S.C. 10.

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"is made for compensating persons injuriously affected by the
"work"(51). The case was not determined on this ground, and
indeed His Honour's observation had nothing whatever to do
with the actual decision, which was that the works themselves
were not authorized by statute and that therefore an injunction 5
must go. But one thing is plain, and that is that what the learned
Chief Justice then had in mind was that the compensation clauses
in the statute would have been sufficient to enable the plaintiff
to recover full compensation for whatever injury he might suffer.
It seems plain that that would have been so if the works had been 10
within the authority of the Act, for the resulting nuisance from
which the plaintiff suffered would have been by reason of the very
nature of the works a permitted nuisance, and any injurious effect
would have been the subject of compensation for injurious
affection of the land. The learned Chief Justice indeed says: 15
"If it had appeared that this work was authorized to be done
"in the manner proposed, and that the injury to the plaintiff was
"the inevitable result of the authorized work, and that the
"defendants could not by the exercise of skill and care have
"avoided causing these injuries, then I should have been of 20
"opinion that the matter was one for compensation and the
"plaintiff would not have been entitled to an injunction; but
"nothing of this sort appears"(52).

Then came *Lytle v. Hastings Borough*(53). There the
defendant borough, acting under statutory authority, had con- 25
structed a drain having an outfall into a tidal river. Subsequently,
it being found that in a wet season the water of the river used to
back up into the drain, the borough constructed a pumping-station
near the plaintiffs' land with the object of increasing the pressure
in the drain. More than a year afterwards—the plaintiffs' claim 30
to compensation then being statute-barred by not having been
brought within the twelve months—when there was a flood in
the river, the plaintiffs' land was flooded, and they claimed
damages and an injunction against the borough on the ground that
its negligence in the construction of the pumping-station and in 35
the conduct of the pumping-operations had caused the mischief.
Edwards, J., held, first of all, that the plaintiffs' remedy
was limited to compensation and that negligence had nothing to
do with the question and could not affect the extent of the
borough's liability. He also held, following the dictum of 40
Prendergast, C.J., in 1885, that the acts of a municipal Council

(51) (1885) N.Z.L.R. 4 S.C. 10, 12.

(52) *Ibid.*, 12.

(53) [1917] N.Z.L.R. 910; G.L.R.
553.

which entitle persons whose lands have been injuriously affected to claim compensation cannot come within the class of nuisances in respect of which liability is preserved by the nuisance clause, which was then s. 150 of the Municipal Corporations Act, 1908, and is now s. 173 of the 1933 Act. I make three observations on this decision. First, there is not a word of reference in the judgment to any of the four decisions of the Court of Appeal in England to which I have referred, although the *Charing Cross Electricity Co.'s* case(54) was cited in argument on behalf of the plaintiffs. It does not appear to have been mentioned in the argument of counsel for the defendant, who seem to have cited and relied upon the dictum of *Prendergast*, C.J., in *Bank of New Zealand v. Blenheim Borough*(55). Secondly, as in the *Blenheim* case (had the work there been authorized by statute), the plaintiff would have had a claim to compensation in respect of the authorized nuisance, so in *Lyttle's case* *Edwards*, J., held that the plaintiffs actually had a claim for compensation, which, however, had lapsed through not being brought within the prescribed period. Thirdly, a close examination of the report shows that the claim was founded entirely upon negligence in the construction and maintenance of the drain and in the design and construction of the pumping plant. The learned Judge held that the construction and use by the defendants of the pumping plant was authorized by statute, and that the construction and intended use thereof entitled the plaintiffs to compensation in respect of their lands as lands injuriously affected thereby. He then proceeded to deal with the question whether if the plaintiffs were so entitled to compensation they might nevertheless maintain their action by virtue of the nuisance clause, and this question he answered in the negative. He said: "Compensation cannot be claimed under the statute unless the act done is authorized by the statute. If the act done is authorized by the statute, then, although apart from the authority given by the statute it would be a nuisance, it cannot be a nuisance within the meaning of s. 150"(56). What the learned Judge held then in effect was that the nuisance complained of was a necessary and authorized nuisance which would have founded a claim for compensation and which was therefore not within s. 150 (the nuisance clause). That was all that was necessary for the decision, and it seems to be all that the learned Judge in fact decided. He does not say that the section applies only to a public nuisance. If that is to

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(54) [1914] 3 K.B. 772, 786.

(55) (1885) N.Z.L.R. 4 S.C. 10, 12.

(56) [1917] N.Z.L.R. 910, 917;
G.L.R. 553, 556.

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be inferred from his judgment, it would seem to me to be a mere dictum which cannot be regarded as authoritative.

In *Fortescue v. Te Awamutu Borough* (57), in the Court of Appeal two of the four members of the Court, *Stout*, C.J. (58), and *Hosking*, J. (59), referred to *Lyttle's* case, but again their observations thereon were *obiter* and had nothing whatever to do with the point on which the case then before the Court was decided. Nor, indeed, does either of them say that the nuisance clause refers only to public nuisances.

In 1924 came the case of *O'Brien v. Wellington City Corporation* (60) before *Stout*, C.J. The learned Chief Justice followed *Lyttle v. Hastings Borough* and seems to have assumed that it was decided on the basis of the previous dictum of *Prendergast*, C.J. Apparently, on that assumption he said that there were no English cases that could be quoted to show that the decision in *Lyttle's* case was wrong. If I am right in this interpretation of what *Stout*, C.J., said, then it would seem that he overlooked the four decisions of the English Court of Appeal to which reference has already been made. Moreover, he again seemed to be under the impression that the compensation clause in the Municipal Corporations Act afforded a right to compensation in respect of every possible nuisance, whether a "necessary" nuisance or not. The learned Chief Justice says: "If it is to be contended that an action may be brought for damages sustained through the exercise of powers given by the statute because of this s. 169 [which is the same as s. 173 of the present Act of 1933] it would mean that the words of s. 167 [which is s. 171 of the present Act] are practically struck out" (61). With respect, that seems to me to be wrong. "It cannot be suggested," the learned Chief Justice goes on, "that there could be two remedies—namely, a remedy by action and for injunction, and also a remedy for compensation for the same injury" (62). I agree; and the learned Chief Justice may have been right in the circumstances of the particular case before him. Then His Honour goes on to say: "These sections must, if possible, be read so as to be both effective" (63). Again I agree, and I say that they are both effective according to the construction which I place upon them. His Honour's judgment is open to the same criticism as that of *Edwards*, J., in *Lyttle's* case. He came to the conclusion, rightly

(57) [1920] N.Z.L.R. 281; G.L.R. (60) [1928] N.Z.L.R. 215; [1925] 214. G.L.R. 129.

(58) *Ibid.*, 289; 218.

(59) *Ibid.*, 300; 223.

(61) *Ibid.*, 222; 133.

(62) *Ibid.*

(63) *Ibid.*

or wrongly, that the damage resulting from the nuisance, if nuisance there were, would have founded a claim to compensation. Having come to that conclusion, what he proceeded to say or imply in regard to the nuisance clause being applicable only to public nuisances(64) was, it seems to me, unnecessary to his decision in favour of the defendants and was therefore an obiter dictum.

Then, in *Kirkcaldie v. Wellington City Corporation*(65), *Ostler, J.*, makes some observations on the point, but they are purely obiter, as he himself says: "It becomes unnecessary to decide the question, which was strenuously disputed, as to whether the nuisance created by defendants amounts to a public nuisance"(66). He said that the two decisions of *Stout, C.J.*, and *Edwards, J.*, following the dictum of *Prendergast, C.J.*, decided that the nuisance clause in the Municipal Corporations Act prohibits only the creation of a public nuisance. But he adds: "Moreover they decide that the section does not relate to nuisances for which compensation has been provided"(67). Although it is true that he also says that in his opinion the reasoning upon which those decisions are based is incontrovertible, his dictum was, as I have said, purely *obiter*, and the precise point that has to be determined now could not have been in his mind.

In so far as (if at all) *Lyttle's case*(68) and *O'Brien's case*(69) (or either of them) decide that the nuisance clause applies only to a public nuisance, they are, in my opinion, wrongly decided, and should not be followed by this Court. They were based, as was the original dictum of *Prendergast, C.J.*, on the hypothesis that the compensation provisions provided for compensation for every possible nuisance. There are various decisions subsequent to the dictum of *Prendergast, C.J.*, which, I think, show that that hypothesis is erroneous. I can see nothing to prevent me as a Judge of this Court from refusing to be bound by decisions and dicta of individual Judges, however eminent, which were based from the outset upon an erroneous hypothesis and which are contrary, as it seems to me, to the decisions of very strong Courts of Appeal in England. Moreover, with very great respect, as I have already said, I think that, once it appears—and I think it does appear—that the original dictum and the subsequent decisions or dicta in New Zealand are based upon

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(64) *Ibid.*, 219, 220; 131, 132.

(65) [1933] N.Z.L.R. 1101; G.L.R. 719.

(66) *Ibid.*, 1115; 726.

(67) *Ibid.*

(68) [1917] N.Z.L.R. 910; G.L.R. 553.

(69) [1928] N.Z.L.R. 215; [1925] G.L.R. 129.

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an erroneous hypothesis as to the meaning of s. 173, it is tolerably clear upon principle and apart from authority that s. 173 refers just as much to private as to public nuisances, subject only to the modification that the Corporation is not liable to pay damages caused by a necessary nuisance, whether during construction 5 of the public work or as a consequence of its user, in respect of which the person injured would have been entitled to claim compensation.

Since the argument, there have been brought to my notice two cases—one in Australia and the other in Northern Ireland— 10 which were not cited in argument, but which I think I should mention: *Cox Bros. (Australia), Ltd. v. Commissioner of Waterworks*(70) and *Burniston v. Bangor Corporation*(71). In both cases a claim was made for damages resulting from the escape of water from water-mains laid in roads by a Corporation under 15 statutory authority. In each case the claim failed, the Court holding that the action could not succeed in the absence of proof of negligence. But the decision in each case turned upon the absence of a nuisance clause from the authorizing statute. In the Australian case there was a limited provision on the subject 20 of nuisance, which appeared in the Act as a proviso to a particular section, and it was held by the Judge of first instance that the operation of the proviso was limited to liability arising from the exercise of the powers contained in that section. As pointed out by *McTiernan, J.*, counsel for the appellant abandoned the 25 contention which he made in the Court below that the proviso to the particular section extended to preserve the liability of the respondent to an action for nuisance in respect of the matters with which the appeal was concerned(72). Both *Dixon, J.*(73), and *McTiernan, J.*(74), pointed out that there was no provision 30 in the authorizing statute preserving a liability for nuisance arising from the conduct or maintenance of the system. The position was therefore held to be the same as in *Burniston v. Bangor Corporation*(75), where there was no nuisance clause at all. It appears to me to be implicit from what the learned Judges 35 said in both these cases that in each case if there had been a nuisance clause such as we have in our statute the judgment must have been the other way.

The English decisions, such as *Colac Corporation v. Summerfield*(76) and *Raleigh Corporation v. Williams*(77), and 40

(70) [1934] S.A.S.R. 101; aff. on (74) *Ibid.*, 129.

app. 50 C.L.R. 108.

(71) [1932] N.I. 178.

(72) [1933] 50 C.L.R. 108, 127.

(73) *Ibid.*, 121.

(75) [1932] N.I. 178.

(76) [1893] A.C. 187.

(77) [1893] A.C. 540.

such New Zealand decisions as *Grey County v. Frankpitt*(78),
Palmerston North Borough v. Fitt(79), and *Farrelly v. Pahiatua*
County(80), have, to my mind, nothing to do with this case. In
 the last-mentioned case (*Farrelly v. Pahiatua County*) *Stout, C.J.*,
 5 attempts a classification of the cases in which compensation and
 damages may respectively be claimed, but his classification does
 not include or refer to the class of case now under consideration,
 where the nuisance complained of is not a "necessary" nuisance
 and does not give rise to a claim for compensation. Indeed,
 10 neither the Public Works Act nor the Counties Act, which were
 the two Acts that had to be considered in *Farrelly's* case, con-
 tained a nuisance clause. *Frankpitt's* case(81) was also a county
 case. Nor did any question of a nuisance clause arise in
Palmerston North Borough v. Fitt(82).

15 That the condition of things in the present case amounted to
 a nuisance cannot be disputed. *Lord Sumner* in the *Charing*
Cross Electricity Supply Co.'s case(83), where similar conditions
 existed, quoted what *Collins, M.R.*, said in *Midwood's* case(84),
 thus: "If that was not a nuisance, I do not know what would
 20 "be one."

Negligence on the part of the defendant is not alleged in this
 case, but, in my opinion, for the reasons that I have given, the
 action lies as for nuisance quite apart from any question of
 negligence. There are various possible grounds of defence, such,
 25 for example, as act of God; but no such defence is alleged or
 suggested here. In the result, the plaintiff is, in my opinion, entitled
 to recover the sum of £694 2s. 4d., to which amount it is admitted
 the claim must be reduced.

I may add that the very point that arises in this case—viz.,
 30 whether an action lies for nuisance apart from any question of
 negligence—was raised in an action against the Wellington City
 Corporation that came before me in December, 1930. The alleged
 nuisance there was the escape of sewage from a sewage main into
 the basement of premises fronting the street under which the
 35 main was laid. The point, however, did not call for determination,
 as I held on the evidence that the trouble had been caused by an
 earthquake, and that the Corporation was therefore not liable.

(78) (1899) 18 N.Z.L.R. 111; 1 (81) (1899) 18 N.Z.L.R. 111; 1
 G.L.R. 217. G.L.R. 217.

(79) (1901) 20 N.Z.L.R. 396; 4 (82) (1901) 20 N.Z.L.R. 396; 4
 G.L.R. 4. G.L.R. 4.

(80) (1903) 22 N.Z.L.R. 683; 5 (83) [1914] 3 K.B. 772, 778.
 G.L.R. 294. (84) [1905] 2 K.B. 597, 605.

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OSTLER, J. This is a case which came before the Chief Justice for trial in Dunedin on February 10, 1939, and, there being no dispute on the facts, was removed by him into the Court of Appeal for argument on questions of law. The admitted facts are that between December 24 and 29, 1937, water escaped from a pipe situated under the surface of Princes Street, Dunedin, which pipe was vested in and under the control of the defendants as part of the city waterworks, and that water entered the basement of premises in Princes Street occupied by the plaintiff company and damaged goods stored in the basement. The plaintiff company sued the defendants for £694 2s. 4d. damages, basing its claim entirely upon nuisance, there being no allegation that the escape of water from the pipe was caused by negligence. The defendants pleaded that the pipe from which the water escaped was laid as part of a system of waterworks which had been constructed and were being used under statutory authority; that the defendants were not liable in law for the escape of water from the pipe in the absence of negligence; and that the statement of claim accordingly disclosed no cause of action. At the hearing, the following admissions were made on behalf of the defendants:

- (i) That there was nothing about the premises which would enable any one to foretell that they would be flooded by city mains;
- (ii) that there was nothing about the premises that rendered them specially liable to flooding from city mains, except that the cellar was below the level of the street and of the mains. It was admitted by counsel for the plaintiff company that the walls of the basement were of rough concrete not plastered, and also that the defendants as soon as notified caused the escape of water into the plaintiff company's premises to cease. The learned Chief Justice removed the case into the Court of Appeal because counsel for the plaintiff company admitted that he could not succeed unless he could successfully attack certain judgments and dicta, some of them of long standing, in the Supreme Court.

The contention of counsel for the plaintiff company is that the defendant Corporation is liable under the rule in *Rylands v. Fletcher*(1) for damage caused by the escape of water from its mains even without negligence, because of the provisions of s. 173 of the Municipal Corporations Act, 1933, which is in the following words:

Nothing in this Act shall entitle the Council to create a nuisance, or shall deprive any person of any right or remedy he would otherwise have against the Corporation or any other person in respect of any such nuisance.

(1) (1868) L.R. 3 H.L. 330.

For this proposition, reliance is placed upon two decisions of the English Court of Appeal—*Midwood and Co., Ltd. v. Manchester Corporation*(2) and *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*(3). He admits that the pipes were laid

5 under statutory authority, though he made a point that such authority was merely permissive and not mandatory; but he contends that this authority to construct and use a public work was granted subject to the Corporation being liable for any nuisance created by its user, by reason of the words used in s. 173. In

10 my opinion, it is clear law that where statutory authority is given to a local body to construct a public work, whether that authority is permissive or mandatory, that local body is not liable for a nuisance caused by a user of that public work if that user is in pursuance of the statutory authority, unless the Legislature has

15 provided otherwise. That was decided by the Court of Appeal in *Green v. Chelsea Waterworks Co.*(4), a case in which one of the defendant company's water-mains burst and flooded the plaintiff's premises. It was held that, no negligence having been proved, the plaintiff had no cause of action. *Lindley, L.J.*, speaking of

20 the rule in *Rylands v. Fletcher*, said: "It is possible that that principle might have been applied to companies having statutory authority to make railways or carry water, but the Court has declined to extend it to such cases"(5). In that case the statutory authority to construct the work was merely permissive

25 though the duty of keeping mains filled when once the work was constructed was mandatory. But the Court of Appeal did not advert to that point, or endeavour to found its judgment upon it. The law is the same, in my opinion, whether the statutory authority is a command or a permission.

30 The question then is whether the Legislature has by s. 173 of the Municipal Corporations Act, 1933, provided that a Corporation shall be liable for a private nuisance created by the user in pursuance of statutory authority of its waterworks. Now that section was first enacted as s. 228 of the Municipal Corporations

35 Act, 1876, in practically identical words, and has been re-enacted as s. 207 of the Act of 1900, as s. 150 of the Act of 1908, as s. 169 of the Act of 1920, and, lastly, as s. 173 of the Act of 1933. In 1886, some fifty-three years ago, this section first came up for interpretation in the Courts in *Bank of New Zealand v. Blenheim*

40 *Borough*(6), where *Prendergast, C.J.*, expressed the opinion that

(2) [1905] 2 K.B. 597.

(3) [1914] 3 K.B. 772.

(4) (1894) 70 L.T. 547.

(5) *Ibid.*, 549.

(6) (1885) N.Z.L.R. 4 S.C. 10, 12.

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it referred only to public nuisances, for the reason that provision was made for compensating persons injuriously affected by the public work. That opinion was no more than a dictum; it was not necessary for the decision of the case; but it remained unquestioned, and was apparently deemed to be good law for thirty-one years, when the question came up again for direct decision in *Lyttle v. Hastings Borough*(7). In that case the dictum of *Prendergast*, C.J., was expressly approved and adopted as the correct interpretation of s. 150 of the Municipal Corporations Act, 1908, and it was decided that that section applies only to public nuisances. *Lyttle v. Hastings Borough* was approved as good law by *Stout*, C.J., and *Hosking*, J., in *Fortescue v. Te Awamutu Borough*(8), a decision of the Court of Appeal. At that time it had been laid down in a number of cases in New Zealand that the only remedy against a local authority for damage caused by the construction of a public work authorized by statute was a claim for compensation even if the local authority had acted negligently, so long as its acts were not in excess of its statutory authority: see *Grey County v. Frankpitt*(9); *Palmerston North Borough v. Fitt*(10); and *Farrelly v. Pahiatua County*(11), the last case being a decision of the Court of Appeal. In *Fitzgerald v. Kelburne and Karori Tramway Co., Ltd.*(12), it was held that the right to compensation given by the Public Works Act included compensation for damage caused by the user as well as by the construction of the public work. It would follow that a claim for compensation would be the only remedy for damage caused by the user of a public work constructed and used by a local body under statutory authority, and therefore a private nuisance created by such user was not actionable. That this was the law was, I think, established in New Zealand before 1920, when the Municipal Corporations Act, 1920, was enacted. But that Act re-enacted s. 169 in the same words as s. 150 of the Act of 1908. The point again came up for decision in *O'Brien v. Wellington City Corporation*(13), in which case *Stout*, C.J., again followed *Lyttle v. Hastings Borough* in holding that s. 169 applied only to public nuisances. These cases were again followed by me in *Kirkcaldie v. Wellington City Corporation*(14). After that decision the Municipal Corporations

(7) [1917] N.Z.L.R. 910; G.L.R. (11) (1903) 22 N.Z.L.R. 683; 553. G.L.R. 294.

(8) [1920] N.Z.L.R. 281; G.L.R. (12) (1901) 20 N.Z.L.R. 406; 421. G.L.R. 42.

(9) (1899) 18 N.Z.L.R. 111; 1 (13) [1928] N.Z.L.R. 215; [1925] G.L.R. 217. G.L.R. 129.

(10) (1901) 20 N.Z.L.R. 396; 4 (14) [1933] N.Z.L.R. 1101, 1114; G.L.R. 4. G.L.R. 719, 726.

Act, 1920, was repealed and replaced by the present Act of 1933, in which s. 173 appears in practically the same words as in all the previous Acts. The dictum of *Prendergast*, C.J., as to this section referring only to public nuisances has been unquestioned
 5 for fifty-three years; in 1917, after it had stood for thirty-one years, it was expressly laid down as good law in *Lyttle v. Hastings Borough*(15). That case has been since approved and followed in the instances mentioned. On two occasions after the original dictum had been decided to be the law the Legislature has re-
 10 enacted the section construed without any alteration in its words or meaning. In my opinion, therefore, it must be presumed by this Court that the Legislature intended the section to have the meaning already given to it by the decisions of the Supreme Court, and it is far too late to ask our Courts to reverse the long stream of
 15 authority and put a construction upon s. 173 which it has not been thought to bear for over fifty years. If the Legislature intends that local bodies should be liable for private nuisances caused by their user of public works constructed and used in pursuance of statutory authority, in my opinion it must make that plain by
 20 fresh enactment. The question is purely one of construction. In the two English cases relied on the statutes and regulations construed were not in the same words as ours. If those cases had been decided before 1886 the dictum of *Prendergast*, C.J., might have been the other way. They were both decided, however,
 25 before, and one of them, *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*(16), was cited in *Lyttle v. Hastings Borough*(17). But it was evidently thought to be distinguishable, and the reasoning upon which the latter judgment is based is, in my opinion, sound and satisfactory.

30 It is contended that *Lyttle v. Hastings Borough*, if not wrongly decided, is distinguishable, because the reason given for that decision is that a person injuriously affected by the construction of a public work by a local body under statutory authority has a statutory right to compensation, whereas in this case there is no
 35 such statutory right, and if the plaintiff company has not a right of action for a private nuisance it has no remedy. It is true that in that case there was a right of compensation given to the plaintiff; but, as was pointed out in the judgment, it was an illusory right, for the damage was not suffered until the right to claim com-
 40 pensation for it had expired by effluxion of time. The judgment really proceeds on the ground that, notwithstanding that the

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(15) [1917] N.Z.L.R. 910; G.L.R. 553. (17) [1917] N.Z.L.R. 910; G.L.R.
 (16) [1914] 3 K.B. 772. 553.

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plaintiff had no other remedy, as the construction of the work was authorized by statute, it could not be held to be an actionable nuisance, for so to hold would be to hold that a work creating a nuisance which the Legislature had authorized was nevertheless unlawful and actionable. The judgment deals with the construction of a public work, but the same reasoning applies to the user of such work. Notwithstanding that there is no other remedy provided, if the user of the work is in pursuance of the statutory authority, a nuisance created by such lawful user cannot be held to be actionable, for to do so would be to hold that unlawful which the Legislature had authorized. In my opinion, therefore, the fact that no remedy has been provided by the Legislature cannot distinguish *Lyttle v. Hastings Borough* from this case. There is, indeed, a presumption to be made in the construction of statutes that the Legislature will not take away private rights without providing for compensation. But, nevertheless, that is sometimes done, and where the words of the Act clearly evince that intention they must be construed accordingly. The test as to whether a private nuisance created by a local body is actionable or not is therefore not whether no other remedy has been provided, but whether it has been created in pursuance of statutory authority; if it has, then, notwithstanding that the person injured by the nuisance has never been given any right to compensation, he has no right of action for nuisance against the local authority; any claim for such damage can be based on negligence alone, which cannot be presumed to have been authorized by the Legislature.

I think it is clear that the Legislature has not provided for any remedy for such damage as the plaintiff company has suffered in this case, for two reasons: (i) Because the right to compensation is limited to the taking of or injurious affection to land; and (ii) because, even if the damage in this case had been to land and not to goods, the possibility of such a claim would be incapable of estimation. With regard to the first reason, although s. 171 of the Municipal Corporations Act, 1933, provides for compensation not only for persons whose land is taken or injuriously affected by the public work, but also for persons suffering any damage from the exercise of the statutory powers, the section goes on to provide that the compensation shall be determined in the manner provided by the Public Works Act. That Act makes it clear that only damage in respect to land can be taken into consideration in assessing compensation: see s. 79 of the Act of 1928. That section has been repealed by s. 28 of the Public Works Amendment Act, 1936, but such repeal has not altered the law in this respect.

The point has been judicially decided in *Handley v. Minister of Public Works*(18), *Russell v. Minister of Lands*, *Sainsbury v. Minister of Lands*(19), *Hone te Anga v. Kawa Drainage Board*(20), and *Wood v. Taranaki Electric-power Board*(21). The plaintiff

- 5 company could therefore never have had any remedy by compensation if its goods had been damaged without negligence during the course of the construction of the defendant Corporation's waterworks. But that fact would not have given the plaintiff the right to claim for that damage in an action for nuisance. In
10 my opinion, the position is the same whether the damage to goods is caused by the construction or the user of public works. So long as the user is in pursuance of the authorizing statute and there has been no negligence in such user, there is no right of action. This may be thought unjust, but it may well have been considered
15 by the Legislature that, where such works are constructed and used by local authorities not for private profit but in the public interest, there is reason and justice in this state of the law.

- I cannot agree that the point raised in this case is a new one. For many years it has been thought to be the law by the profession
20 that there was no remedy for a private nuisance caused by the user by a local authority of a public work constructed and used under statutory authority. During the years that I have been on the Bench no such claim has ever come before me for decision; and yet the occurrence of damage through such a private nuisance
25 must be common. I take it that claims have not been common in respect of them, because it has been thought by the legal profession that such claims cannot succeed in law. The Legislature must, therefore, be presumed to have been aware of the law when it made the last two re-enactments of s. 173. The two last
30 Municipal Corporations Acts were not merely consolidations; they both contained amendments.

- When it was first held that s. 173 applied only to public nuisances, it was, of course, not intended to hold that it applied to *all* public nuisances, for so to hold would make it impossible for local authorities in many cases to construct or use the work for which they
35 had statutory authority. It must be presumed that what was held was that s. 173 was intended to apply only to such public nuisances as were not necessarily within the statutory powers of the local authority to create, and that, in my opinion, is the law
40 at the present time.

(18) (1914) 16 G.L.R. 683.

(19) (1898) 17 N.Z.L.R. 241; 1

G.L.R. 15.

(20) (1914) 33 N.Z.L.R. 1139; 16
G.L.R. 696.

(21) [1927] N.Z.L.R. 392; G.L.R.
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For these reasons, in my opinion, judgment should be for the defendant Corporation, with costs according to scale on the amount of the claim, witnesses' expenses and disbursements, and an additional £25 for the extra days which the argument took in this Court.

5

SMITH, J. The defendant is a municipal Corporation under the Municipal Corporations Act, 1933. It is authorized by statute to construct and maintain waterworks. From its waterworks it laid pipes, which were part of its waterworks, under the surface of Princes Street, Dunedin. These pipes, it is not disputed, were 10
duly and properly laid. Water escaped from one of the pipes and damaged the plaintiff's goods in a basement occupied by the plaintiff in Princes Street. The plaintiff sues the defendant for damages. The defendant pleads (i) that the pipes were laid pursuant to statutory powers, and that the defendant is not liable 15
in law for damage caused by the escape of water from the pipes unless caused by negligence on its part; and (ii) that, in the absence of negligence, the statement of claim discloses no ground of action against the defendant.

When the case came to trial, the only evidence taken concerned 20
the amount of damages. Certain admissions were also made by counsel as follows: (i) There is nothing about the premises that would enable any one to foretell that they would be flooded by city mains; (ii) there is nothing about the premises that renders them specially liable to flooding from the city mains except that 25
the cellar is below the level of the street and the level of the mains; (iii) the walls of the cellar are of rough concrete, not plastered over; (iv) the water escaped between the dates mentioned in the statement of claim; and (v) the defendant caused the escape of water to cease promptly after being notified of such escape. In this 30
state, the action was, on the plaintiff's application, the defendant not objecting, removed into the Court of Appeal for argument and determination.

It will be seen that the plaintiff makes no allegation of negligence, and that there has been no investigation of the cause 35
of the escape such as is usual in cases of this type. The only conclusions of fact which the Court can draw from the pleadings and the admissions are that the water-pipes were duly laid under statutory authority, that the escape was not due to negligence, but was due to some accidental omission to repair or renew the 40
pipes which could not have been foreseen or guarded against by any reasonable precautions which the Corporation might have been expected to take.

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Upon these conclusions of fact, the question is whether the plaintiff is entitled to rely on the rule in *Rylands v. Fletcher*(1). That rule is subject to certain qualifications and defences. The main defence argued was that the defendant was protected by
5 statutory authority. Mr. *Haggitt* did also emphasize a submission that there was no precedent for making a municipal Corporation liable as an insurer in a case like the present; and he referred to *Sargood v. Dunedin City Corporation*(2), decided in the year 1888. In that case, a heavy rainfall caused a sewer to be flooded, and
10 water thereby flooded the plaintiffs' cellar, extensively damaging the plaintiffs' goods. The relevant statutory powers and restrictions were apparently the same then as to-day. The nuisance clause then appeared among the drainage sections of the Municipal Corporations Act, 1886, but no liability on the ground of nuisance
15 was suggested. Neither *Williams, J.*, nor the Court of Appeal held that negligence had been proved. Mr. *Haggitt* urged that the eminent lawyers who dealt with that case, both on the Bench and at the Bar, would not have overlooked the ground of nuisance if they had thought it sound, and that they would not have been
20 deterred by the obiter dictum of *Prendergast, C.J.*, uttered three years before in *Bank of New Zealand v. Blenheim Borough*(3). Upon this, it may be observed that *Sargood's* case(4) was decided many years before *Midwood and Co. v. Manchester Corporation*(5) showed how the doctrine of *Rylands v. Fletcher* would be developed.
25 Mr. *Haggitt's* submission that the case is without precedent does suggest an inquiry into the other defences. The act of God or of a stranger may be disregarded, as they have not been pleaded. Two qualifications of the rule—viz., that the rule does not apply (i) unless there has been a non-natural or extraordinary user of the
30 land, and (ii) unless the user has been for the defendant's own purposes, may be noticed.

As to the first of these, nothing could be more usual in New Zealand that the use of streets or the land underneath them for the laying of water-mains. Yet I do not think that makes the use
35 a natural one. Water is not always dangerous, and is sometimes regarded as falling within the rule and sometimes not. In this case, the water was carried in bulk in mains. That renders its use dangerous: *Collingwood v. Home and Colonial Stores, Ltd.*(6). Cf. *Western Engraving Co. v. Film Laboratories, Ltd.*(7). In my

(1) (1866) L.R. 1 Ex. 265; aff.
on app. (1868) L.R. 3 H.L.
330.

(2) (1888) 6 N.Z.L.R. 489.
(3) (1885) N.Z.L.R. 4 S.C. 10.

(4) (1888) 6 N.Z.L.R. 489.

(5) [1905] 2 K.B. 597.

(6) [1936] 3 All E.R. 200, 208.

(7) [1936] 1 All E.R. 106.

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opinion, that is sufficient to prevent the use of the streets for that purpose from being a natural or ordinary use.

As to the second qualification, no attempt was made to show that the user was not for the defendant's own purposes. The relationship of the plaintiff to the defendant as a ratepayer and voter is, I think, immaterial. It is true that in *Rickards v. Lothian*(8) *Lord Moulton*, in delivering the judgment of the Privy Council, said with reference to *Rylands v. Fletcher*: "It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community"(9). The italics are mine. The last phrase is, I think, intended to state the antithesis of the phrase "for its own purposes." It does not establish that a municipal Corporation carrying water in bulk in mains under statutory authority would be doing so for purposes other than its own. This view is supported by the judgment of the Privy Council in *North-western Utilities, Ltd. v. London Guarantee and Accident Co.*(10). In that case, an hotel, belonging to and insured by the respondents respectively, was destroyed by fire caused by the escape and ignition of natural gas, which percolated through the soil and penetrated into the hotel basement from a fracture in a 12-in.-pressure main which belonged to the appellants, who were a public utility company supplying natural gas to consumers in the City of Edmonton. The pressure-main was 3 ft. 6 in. below the street level. Among the defences urged was one that the appellants and the owners of the property destroyed had a common interest in maintaining the potentially dangerous installation or that the owners had consented to the danger. Delivering the judgment of the Privy Council, *Lord Wright* said: "It is true that in proper cases such may be good defences, but they do not seem to have any application to a case like the present, where the appellants are a commercial undertaking, though no doubt they are acting under statutory powers, while those whose property has been destroyed are merely individual consumers who avail themselves of the supply of gas which is offered. These facts do not constitute a common interest or consent in any relevant sense"(11). Similar reasoning applies, I think, to a municipal Corporation under our statute. Each citizen has to take his supply from the only available source. That negatives the notion of consent. The Council may sell its surplus water for motive power :

(8) [1913] A.C. 263.

(9) *Ibid.*, 280.

(10) [1936] A.C. 108.

(11) *Ibid.*, 120.

s. 252 of the Municipal Corporations Act, 1933. That gives the Corporation the character, in some measure, of a commercial undertaking, and negatives the idea of a common interest. I am of opinion that the doctrine of *Rylands v. Fletcher* is not excluded by the qualification that the user must be for the defendant's own purposes; and I may add, generally, on this topic that the very presence of the nuisance clause seems to imply that the Legislature regards a municipal Corporation as a fit subject for the application of the doctrine of *Rylands v. Fletcher*.

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- 10 I turn now to the main defence of statutory authority. Section 173, which provides that nothing in the Act shall entitle the Council to create a nuisance, occurs in Part XVII of the Act under the heading "Public Works." The heading does not affect the interpretation of the statute—s. 5 (f) of the Acts Interpretation
- 15 Act, 1924—but the other sections of this Part, conferring the general powers of the Council with respect to its public works and also the right to compensation on persons affected thereby, show that s. 173 should be given general application. It applies to the Council's waterworks. The statutory authority to construct
- 20 and maintain waterworks must, therefore, be read with the injunction that such authority shall not entitle the Council to create a nuisance. This suggests a possible conflict. If the express statutory authority to construct and maintain the waterworks involves the creation of a nuisance, either public or private, are the
- 25 waterworks thereby prohibited? In the present case, the plaintiff says that the Council has created a nuisance which is prohibited by the statute. The Council says that if the proof in the case shows that a nuisance has been created, then the nuisance is authorized by the statute.
- 30 A preliminary question, which was not argued but which seems to arise, is whether the words of s. 173—"Nothing in this Act shall entitle the Council to create a nuisance"—are equivalent to the words used in the cases on which the plaintiff relies—*viz.*, *Midwood's* case(12) and the *Charing Cross* case(13). In
- 35 *Midwood's* case the words of the Electric Lighting Order which was under review were:

Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them.

- 40 The phraseology of this order was held to cover what appears to have been the result of accidental failure to repair. In the *Charing Cross* case the words of the nuisance clause were:

(12) [1905] 2 K.B. 597.

(13) [1914] 3 K.B. 772.

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Nothing in this Act shall exempt the company from any indictment, suit, action, or other proceeding at law or in equity in respect of any nuisance caused by them.

These words were also held to cover an act of accidental failure to repair. In my opinion, there is no sufficient difference between the phraseology of the English nuisance clauses and the New Zealand clause to indicate that a Corporation might "cause" an accidental escape of water but would not "create" it. The suggested difference is that damage by non-feasance would be covered by the word "cause" but not by the word "create." If that were so, then a municipal Council would be prohibited only from creating or originating a nuisance by doing something which it intended to do by virtue of its statutory powers, not from causing a nuisance by accidental and unintentional non-feasance. Upon the whole, I do not think this construction should be adopted. Although the pipes were well and truly laid, they were from the time they were laid liable to deteriorate and eventually, if not renewed, to burst. In a large city, such bursts are, I believe, not uncommon. In my opinion, if the pipes burst by reason of accidental and unintentional failure to repair or renew, the Council should nevertheless be said, viewing the whole of its operations, to "create" a nuisance. It is in this wide sense of causation that *Cozens-Hardy, M.R.*, in *Price's Patent Candle Co., Ltd. v. London County Council*(14), appears to use the word "create" when stating his summary of the general principles governing cases of this kind. I think, therefore, that the conflict between the statutory authority and the nuisance clause is not to be resolved in this case by saying that the nuisance clause does not extend to accidental and unintentional failure to repair or to renew.

A different line of construction was suggested by *Prendergast, C.J.*, in *Bank of New Zealand v. Blenheim Borough*(15). I propose now to refer to that case and to subsequent New Zealand cases on the point, and to add, by way of comment, references to cases in other jurisdictions.

In *Bank of New Zealand v. Blenheim Borough*, decided in the year 1885, the Corporation proposed to construct a drain through the plaintiff's land which would create a nuisance by causing waters of foreign drainage basins to flow across the plaintiff's land. But for the fact that *Prendergast, C.J.*, thought that there was nothing in the statutory authority which authorized the Corporation to construct a drain which would have the effect alleged, he would have thought a conflict would have arisen between the statutory

(14) [1908] 2 Ch. 526, 543, 544.

(15) (1885) N.Z.L.R. 4 S.C. 10.

authority and the nuisance clause. He then made the suggestion that the conflict might be resolved by construing the nuisance clause as applying only to public nuisances. This construction would have permitted a Corporation to create private nuisances so long as they were within the terms of the statutory authority. The basis of the dictum was that as there was a compensation clause under which persons affected by a private nuisance could be compensated, private nuisances were not prohibited.

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- In *St. Kilda Borough v. Smith* (16), decided in the year 1902, the plaintiff claimed that the Council wrongfully and negligently constructed and allowed a drain or ditch to remain unprotected and uncleansed and the bank to remain in an insecure and faulty condition, whereby his horse fell and was injured. The case was heard by a Magistrate and there was an appeal on point of law. The Magistrate had referred both to negligence and to nuisance, but had apparently used the word "nuisance" to show that he meant the drain was obviously a source of danger to the public and that the Corporation had taken no precautions whatever to prevent its being a source of danger. The learned Judge held that on this ground the Magistrate had found negligence against the borough, and his judgment was upheld as there was evidence to support his finding. The learned Judge, however, referred to the question of nuisance on the assumption that if the drain had been protected by a fence it would have been in law a nuisance although the source of danger would have been removed. The learned Judge then went on to refer to the Magistrate's statement that the creation of a nuisance was forbidden, and said: "The Magistrate has said that the statute forbids the creation of a nuisance. But if any particular work, expressly authorized by the statute, must from its nature be in law inevitably a nuisance, I doubt if this prohibition would prevent the construction of such a work. In such circumstances the prohibition merely emphasizes the existing law, which is that although there may be a right to create a nuisance, yet there is a duty to take every precaution to prevent such a nuisance being a source of danger" (17). The learned Judge here took a different line from that suggested by *Prendergast*, C.J., in resolving a conflict between the statutory authority to execute and maintain a work and the statutory prohibition against the creation of a nuisance. It is true that a fence in a highway would be a public nuisance, but the learned Judge did not suggest that public nuisances were

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prohibited and private nuisances permitted. His language is general, and covers both. He took the view that if the work expressly authorized by the statute would from its nature be in law "inevitably" a nuisance, it would not be prohibited by the nuisance clause. The learned Judge's view is similar to that given twenty-seven years later by *Viscount Dunedin* in *Manchester Corporation v. Farnworth*(18), where he says: "When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized"(19). Both these Judges choose the *discrimen* of "inevitability" as the proper one. The same view, in effect, was taken in *Fullarton v. North Melbourne Electric Tramway and Lighting Co.*(20) by *Griffith, C.J.*, who thought that the distinction lay in the "necessity" for the creation of a nuisance in complying with the statutory authority and spoke of the excuse for the nuisance as being "co-extensive with the necessity"(21). 5 10 15

The next New Zealand case is *Lyttle v. Hastings Borough*(22). In this case, decided in the year 1917, the defendant borough had under statutory authority constructed a drain having an outflow into a tidal river. The drain was used in connection with a sewage plant. It was found that in wet seasons the waters of the river used to bank up in the drain, and the defendants installed a pumping-station with the object of increasing pressure in the drain. After heavy rain, the pumping-station was put into operation and the plaintiff's land was flooded with water from the drain, charged with sewage-matter. The plaintiffs claimed damages on the ground of both negligence and nuisance. The case was heard before a jury, but at the close of the evidence, counsel for both parties agreed that the jury should be asked to assess the damages and that the case should be reserved for further consideration, with liberty to the Court to determine all other questions that might arise and to draw inferences of fact. The statement of claim had alleged that the defendants had negligently allowed the drain to remain in a state of non-repair(23). The case shows that the learned Judge (no doubt with the approval of counsel) disregarded the question of negligent non-repair as a cause of action, and stated a series of questions concerning the construction and use of the defendant's pumping-station upon which he decided the case. He 20 25 30 35 40

(18) [1930] A.C. 171.

(19) *Ibid.*, 183.

(20) (1916) 21 C.L.R. 181.

(21) *Ibid.*, 188, 189.

(22) [1917] N.Z.L.R. 910; G.L.R. 553.

(23) *Ibid.*, 914; 553.

held that the construction and use of the pumping-station were authorized by statute; that the plaintiff's land was injuriously affected thereby; that the plaintiffs thus had had a right to compensation under the statute, though it was then barred by lapse of time; and that the statutory remedy of compensation excluded a right of action at common law. He also held, though it was not necessary to the decision, that the plaintiffs could have no action under the nuisance clause (s. 150 of the Act of 1908), because, following the dictum of *Prendergast*, C.J., that clause did not prohibit the creation of a private nuisance. The ground of the reasoning is that, if such a nuisance were prohibited, a drain could not be constructed on private lands. Yet the learned Judge refers to a tramway with its centre poles as a nuisance in the highway. On his construction of the nuisance clause, that would be prohibited. Nevertheless, he says it would have been quite impossible to hold that a tramway constructed under either of the Acts of 1876 and 1886 was a nuisance within the meaning of the section in each of those Acts which was reproduced in the Act of 1908 as s. 150. The learned Judge does not refer to the Municipal Corporations Act of 1900 in which, as the learned Chief Justice has pointed out, the nuisance clause was first given, by its placing in the Act, a general application to the public works of a municipal Corporation. Yet the reasoning would apply, with the result that if the Act authorized the construction of a tramway with poles in the streets, that would be a nuisance and would be prohibited. In my opinion, this is not the law. If the learned Judge had had his attention called to the test suggested by *Williams*, J., in *St. Kilda Borough v. Smith*(24), it might well be that he would not have dealt with the nuisance clause or would not have adopted the construction of it which he did.

In *Fortescue v. Te Awamutu County*(25), decided in the year 1919, a road, a culvert, and a drain had been constructed by a private owner in such a way that water was collected in the culvert from the road and then carried by the drain and discharged at a point in such a position that it flowed thence on to the appellant's land. The road, culvert, and drain became vested in the borough, and the water continued to be collected and discharged as before. The Corporation was held not liable for the damage so caused, as no act of its own had created or increased the nuisance. Counsel for the defendant borough had cited *Lytle v. Hastings*

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(24) (1902) 21 N.Z.L.R. 205; 4 (25) [1920] N.Z.L.R. 281; G.L.R. G.L.R. 342. 214.

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Borough(26) to support a submission that, under the nuisance clause, a Corporation was entitled to maintain a private nuisance. *Stout*, C.J., said: "A municipality acting in pursuance of the "Municipal Corporations Act, 1908, cannot be sued for injury "done by the performance of such public work"(27). On this basis, he said the only remedy was compensation, and he also referred to the nuisance clause which, he said, had been held in *Lyttle v. Hastings Borough* to refer to a public nuisance, not a mere injury to a private owner. *Chapman*, J., treats the case as one of non-feasance in a highway(28). He indicates, citing *Bathurst Borough v. Macpherson*(29), as explained in later cases, that nuisance in the highway would only arise from active interference resulting in the creation of the nuisance. *Sim*, J., treats the case as one of non-feasance in a highway(30), and says: "The liability for a nuisance arises at common law," and refers to *Sydney Municipal Council v. Bourke*(31) in which the *Bathurst* case was explained(32). Thus, though the nuisance clause, then s. 150 of the Municipal Corporations Act, 1908, was cited to support the right to maintain a private nuisance arising from the discharge of water from a road, neither *Chapman*, J., nor *Sim*, J., referred to it for that purpose. *Hosking*, J., treats the case as one of actionable misfeasance unless the borough could justify under statutory authority, which he held it could do(33). He holds that the only remedy of the plaintiff is a claim for compensation, and cites *Lyttle's* case as an authority on that point. He does not suggest that the nuisance clause can have any application. It may be said that he thereby accepted the view that the nuisance clause applied only to public nuisances. If so, he would be following *Lyttle's* case for that purpose; but he gives no indication of his view. He so clearly holds that the damage was due to the maintenance of the works by the borough in virtue of its statutory powers that it is not impossible he had in mind the distinction suggested by *Williams*, J., in *St. Kilda Borough v. Smith*(34)—viz., that the nuisance was inevitable, and therefore not prohibited though it amounted to misfeasance in respect of a road. In my opinion, there is nothing in *Fortescue's* case to justify the contention that the Court of

(26) [1917] N.Z.L.R. 910; G.L.R. (31) [1895] A.C. 433.

553. (32) *Ibid.*, 440.

(27) [1920] N.Z.L.R. 281, 288; (33) [1920] N.Z.L.R. 281, 299; G.L.R. 214, 218. G.L.R. 214, 223.

(28) *Ibid.*, 292; 220.

(34) (1902) 21 N.Z.L.R. 205; 4

(29) (1879) 4 App. Cas. 256.

G.L.R. 342.

(30) [1920] N.Z.L.R. 281, 296, 297;

G.L.R. 214, 222.

Appeal regarded *Lyttle's* case as an authority for the proposition that the nuisance clause prohibited only the creation of a public nuisance.

The next case is *O'Brien v. Wellington City Council*(35), 5 decided in the year 1924. In that case the nuisance arose from the erection of an electric-power house. The nuisance clause appeared to be applicable. *Stout*, C.J., did not mention the English cases of *Midwood and Co., Ltd. v. Manchester Corporation*(36), or *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*(37), or *St. Kilda Borough v. Smith*(38), but relied on 10 *Lyttle v. Hastings Borough*(39) as a decision that the nuisance clause did not prohibit the creation of a private nuisance. *O'Brien's* case is the decision of a single Judge, and it is in direct conflict with the submissions now made for the plaintiff.

15 The last case is *Kirkcaldie v. Wellington City Council*(40), where the nuisance was created by a septic tank designed to discharge into a stream. *Ostler*, J., held that the Corporation had infringed the rights of the plaintiff to his freehold land without statutory authority, and it became unnecessary for him to consider 20 the conflict between an act authorized by statutory authority and the section of the Municipal Corporations Act prohibiting the creation of a nuisance. He did, indeed, refer to the case of *Lyttle v. Hastings Borough*(41) and to the dictum of *Prendergast*, C.J., in *Bank of New Zealand v. Blenheim* 25 *Borough*(42) with complete approval, but His Honour's opinion was unnecessary to his decision.

From this review of the cases, I am of opinion that it is open to this Court to place the construction which it thinks proper upon s. 173 of the Municipal Corporations Act of 1933. There 30 has been no such authoritative and well-known interpretation of the nuisance clause in the Municipal Corporations Acts to justify the conclusion that when the Legislature re-enacted the clause in the years 1886, 1900, 1908, and 1933, it did so with the intention that the section must be read against its plain and 35 ordinary meaning as applying only to public nuisances. The observations of their Lordships in *Barras v. Aberdeen Steam Trawling and Fishing Co., Ltd.*(43), seem to me amply to justify

(35) [1928] N.Z.L.R. 215; [1925] (40) [1933] N.Z.L.R. 1101; G.L.R. G.L.R. 129. 719.

(36) [1905] 2 K.B. 597.

(41) [1917] N.Z.L.R. 910; G.L.R. 553.

(37) [1914] 3 K.B. 772.

(38) (1902) 21 N.Z.L.R. 205; 4 (42) (1885) N.Z.L.R. 4 S.C. 10, 12.

G.L.R. 342.

(43) [1933] A.C. 402.

(39) [1917] N.Z.L.R. 910; G.L.R. 553.

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this view. Nor is there any ground for applying the principle of *stare decisis*.

How then should the nuisance clause be construed? In my opinion, it applies to all nuisances, whether public or private, and prohibits all nuisances which are not the inevitable result of the exercise of the statutory powers. For the test of inevitability, I adopt, with all respect, the view expressed by Lord Dunedin in *Manchester Corporation v. Farnworth*(44): "When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common-sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense"(45).

It is not disputed that the legislation under which the defendant's pipes were laid was to the same effect as the legislation of Part XX of the Municipal Corporations Act of 1933. Since they were laid, they have been maintained and, at the time the main burst, they were being maintained under the Act of 1933. I think the express authorizing form of that legislation brings the Council, when it lays its pipes beneath the surface of its streets and thereafter maintains them, within the principle that Parliament has authorized a certain thing to be done in a certain place: *Jones v. Festiniog Railway Co.*(46), per *Blackburn, J.*(47). But I am not satisfied that the escape of water was inevitable. Counsel for the defendant submitted that the proof did not establish a nuisance. The true view is that the escape created a nuisance and that the onus is on the defendant to show that the escape, according to the standard laid down by Lord Dunedin, was inevitably part of that which the Legislature had authorized. The defendant has not discharged this onus, and is therefore not protected from the application of the doctrine of *Rylands v. Fletcher*.

The next question is whether the plaintiff's remedy is excluded by the right to compensation. There are many cases which show that where the compensation clause applies, a remedy by action

(44) [1930] A.C. 171.

(45) *Ibid.*, 183.

(46) (1868) L.R. 3 Q.B. 733.

(47) *Ibid.*, 736.

- is excluded: *Colac Corporation v. Summerfield*(48). Other authorities on the point, including New Zealand cases, are cited by *Edwards, J.*, in his judgment in *Lyttle v. Hastings Borough*(49). One of the decisions there referred to, *Farrelly v. Pahiatua County*(50), is a decision of the Court of Appeal. The fundamental question is, however, whether compensation can be claimed for the act which has caused the nuisance. In my opinion, it is clear that no compensation can be claimed on the basis that the authorized works will be allowed to fall into disrepair and remain
- 10 unrepaired. In *Aitcheson v. Bruce County*(51), *Williams, J.*, considered this question in relation to liability arising from non-repair and said: "Compensation could not be assessed on the basis that the works would be allowed to fall into disrepair and remain unrepaired. The compensation is for injury done
- 15 "by the construction and maintenance of the works designed, "not for injury done by their non-maintenance"(52). The learned Judge was here stating his view of the right to compensation conferred by s. 27 of the Public Works Act, 1882, which is to the same effect as s. 171 of the Municipal Corporations Act,
- 20 1933. His view is supported by the reasoning of *Dixon, J.*, in *Metropolitan Water, Sewerage, and Drainage Board v. O. K. Elliot, Ltd.*(53). That learned Judge there discusses the right to compensation in relation to the power of maintenance, and points out that the language of the New South Wales statute conferred
- 25 a right to compensation upon a party who had some specific interest in land which was affected by an operation of maintenance. The Board was required to "inflict" as little damage as possible. The right to compensation was therefore dependent on some active operation of maintenance. The learned Judge then said: "An
- 30 "outburst of water in the street results, not from some active "work of maintenance, but from the failure of the pipe to "withstand the pressure of the water with which it is charged. "It is charged with water in the exercise of the Board's power, "and duty, to maintain a supply of water. . . . Clear
- 35 "expressions are needed before statutes, giving a general right of "compensation in respect of public works and undertakings, are "construed to impose an absolute liability upon an authority for "every accidental loss which may be suffered in the course of its "daily conduct. . . . Damage from the escape of water

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(48) [1893] A.C. 187.

(49) [1917] N.Z.L.R. 910, 916;

G.L.R. 553, 555.

(50) (1903) 22 N.Z.L.R. 683; 5

G.L.R. 294.

(51) (1896) 15 N.Z.L.R. 483.

(52) *Ibid.*, 485, 486.

(53) (1934) 52 C.L.R. 134.

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"from a bursting main is not, in my opinion, injurious affection
"to land from the exercise of a power of maintenance" (54). This
reasoning seems to me to apply to s. 171 of our Municipal Corpora-
tions Act, 1933, which gives compensation to every one "suffering
"any damage from the exercise of any of the powers hereby
"given." When compensation is sought in respect of the power
of maintenance, what must be assumed is the "exercise" of the
powers, not that they will not be exercised and the works allowed
to decay. In the present case, the nuisance has been caused not
by the exercise of the power to repair and renew, but by the failure
to exercise it. The damage is not covered by the compensation
clause. On the other hand, the nuisance clause itself gives the
clear expression that is required to impose liability on the
principle of *Rylands v. Fletcher* for accidental injury. The
plaintiff is therefore entitled to bring its action and to succeed
in it.

I desire to reserve my opinion on two points. The plaintiff's
claim under *Rylands v. Fletcher* is based on some occupation of
land. The claim for damage to the plaintiff's goods is fortuitous
and incidental. The right to compensation under the Act must
relate to damage affecting an interest in land: *Russell v. Minister
of Lands* (55) and *Wood v. Taranaki Electric-power Board* (56).
Assuming the plaintiff's basement was used for storing goods, I
express no opinion on the point whether the remedy under the
compensation clause was excluded and a remedy by action became
available by reason (i) of the damage to the goods not being
damage affecting an interest in land or (ii) of the possibility of
such a claim being incapable of estimation.

For the reasons which I have stated, judgment should, in my
opinion, be entered for the plaintiff.

JOHNSTON, J. The facts are not in dispute, and it is
unnecessary for me to repeat them.

The short question is the construction to be placed upon s. 173
of the Municipal Corporations Act, 1933. Our ultimate tribunal
has, I think, in *North-western Utilities, Ltd. v. London Guarantee
and Accident Co., Ltd.* (1), determined quite clearly that the
inclusion of a "nuisance clause" of this nature in a statute, con-
ferring authority to execute works of various kinds, limits the
immunity statutory authority would otherwise give to the
consequences of all authorized work, and re-establishes the

(54) (1934) 32 C.L.R. 134, 150, 151.

(55) (1898) 17 N.Z.L.R. 241, 250;

1 G.L.R. 15, 16.

(56) [1927] N.Z.L.R. 392, 406;

G.L.R. 235, 242.

(1) [1936] A.C. 108.

common-law doctrine, as determined by *Rylands v. Fletcher*(2). If the construction adopted in that case applies to the statute we are considering and the plaintiff can show his case to be within the principle of *Rylands v. Fletcher*, he is entitled to damages.

5 The defendant in turn can meet such a claim if it can show its case to be within one of the established exceptions to that principle.

It is suggested that the setting of s. 173 in the Municipal Corporations Act, 1933, being different from the setting of the
10 nuisance clause in the cases considered by the Privy Council in *North-western Utilities, Ltd. v. London Guarantee and Accident Co., Ltd.*(3), in that in those cases the statutory grantees were trading corporations, while we are here dealing with a municipal Corporation, and because of the presence of a compensation
15 clause—namely, s. 171—in our Act wide enough to embrace claims founded on the doctrine of *Rylands v. Fletcher* and comprehensive enough to exclude such claims being pursued as they arose by an ordinary action for damages, supports a contention that a more limited construction has to be given to the language employed in
20 s. 173 than ordinary and proper usage attributes to it.

As I understand it, it is, in substance, the latter of the two grounds that has led to dicta of the Judges in *Bank of New Zealand v. Blenheim Borough*(4) and *Fortescue v. Te Awamutu Borough*(5), that the nuisances referred to in s. 173 are public
25 nuisances only, and to the decision of *Edwards, J.*, in *Lyttle v. Hastings Borough*(6), to the effect that s. 171 exhausts claims founded on *Rylands v. Fletcher*. *Edwards, J.*, in that case, and the Chief Justice, *Sir Robert Stout*, in *O'Brien v. Wellington City Corporation*(7), proceeded on the sound proposition of con-
30 struction that our statute must be read so as to give effect so far as is possible to both s. 171 and s. 173, but an attribution that relegates to s. 171 private nuisances and to s. 173 public nuisances, if not justified by the language actually used by the Legislature, can, in my opinion, only be supported if the assumedly different
35 functions of the two sections cannot be otherwise distinguished.

To my mind, s. 171 deals with authorized, and therefore rightful, acts; and for them those detrimentally affected are, despite their legality, given the right to compensation. Section 173, on the other hand, refuses immunity beyond that given by

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(2) (1868) L.R. 3 H.L. 330.

(3) [1936] A.C. 108.

(4) (1885) N.Z.L.R. 4 S.C. 10.

(5) [1920] N.Z.L.R. 281; G.L.R.

(6) [1917] N.Z.L.R. 910; G.L.R. 553.

(7) [1928] N.Z.L.R. 215; [1925] G.L.R. 129.

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the common law in the event of the statutory grantee creating a nuisance dehors his specified statutory right. I find no confusion in the language or effect of the two sections, and, with very great respect to the learned Judges who have thought otherwise, cannot understand how the rights specially reserved by the plain language of s. 173 are limited by a section giving compensation for authorized acts, or how, in general, acts prohibited by s. 173 are made justifiable by reference to s. 171. To my mind, the decision in *Midwood and Co., Ltd. v. Manchester Corporation*(8), which sharply rejected the argument that the nuisance clause there considered applied to public nuisance only, precludes us from building on the dictum of *Prendergast, C.J.*, in *Bank of New Zealand v. Blenheim Borough*(9), which admittedly influenced the decision of *Edwards, J.*, in *Lyttle v. Hastings Borough*(10), and we are left to appreciate the distinction *per se* in the acts referred to in the two sections, and in the mind of the Legislature.

As long ago as *Truman v. London, Brighton, and South Coast Railway Co.*(11) the distinction between necessary nuisance (such as vibration in the use of a railway) inherent to the proper use of an authorized work, and nuisance not *per se* incident to the work, was recognized. Without that recognition, it was pointed out the absurd position would be reached that a person who had cause for complaint could obtain an injunction and so prevent that which the Legislature intended could be done. Hence the necessity for a compensation clause for injury done despite the legality of the act causing damage. That case reached the House of Lords. The *Earl of Selborne* says: "Here there are, the 'line being drawn, as is usual in Railway Acts, between lands taken or injuriously affected by the construction of the works' (which are subjects of compensation) and lands which or persons who may suffer some subsequent detriment or annoyance from the authorized use of the railway and works when constructed; 'so that if the question had been one of compensation the respondents would not be within the line'(12). It is, in my view, such a line that s. 171, if standing by itself, draws, and it is likely that, if s. 173 were not included, on the authority of *London, Brighton, and South Coast Railway Co. v. Truman*, in the House of Lords, where it was held the lands and persons who suffered some subsequent detriment or annoyance from the authorized use of the works could not recover, plaintiff would not be entitled to damages. Section 173, by reintroducing the doctrine of

(8) [1905] 2 K.B. 597.

(9) (1885) N.Z.L.R. 4 S.C. 10, 12.

(10) [1917] N.Z.L.R. 10; G.L.R. 553.

(11) (1885) 29 Ch.D. 89; rev. on app. (1885) 11 App. Cas. 45.

(12) (1885) 11 App. Cas. 45, 58.

Rylands v. Fletcher first ousted by affirmative statutory authorization to construct, amends that position and allows these other lands and other persons to recover subject to the defences to the doctrine of *Rylands v. Fletcher*.

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- 5 The same distinction, as has been pointed out by the Chief Justice, is drawn in *Shelfer v. City of London Electric Lighting Co.*(13). This recognized distinction is, in my opinion, quite sufficient to enable one to follow the rule of construction that effect should be given to both ss. 171 and 173, and at the same
- 10 time observe and follow the language of s. 173 that the authorized party should be liable for nuisance, and entitled to the advantage of the exceptions to the principle of *Rylands v. Fletcher*. By this construction no violence, so far as I can see, is done to the construction placed upon s. 171 by the Court of Appeal in
- 15 *Farrelly v. Pahiatua County*(14).

In my opinion, therefore, the question to be determined in this case has to be answered by reference to the principle of *Rylands v. Fletcher*.

- In both *North-western Utilities, Ltd. v. London Guarantee*
- 20 *and Accident Co., Ltd.*(15), and *Collingwood Ltd. v. Home and Colonial Stores, Ltd.*(16), it is pointed out, following *Richards v. Lothian*(17), that "it is not every use to which land is put that
- "brings into play the principle of *Fletcher v. Rylands*. It must
- "be some special use bringing with it increased danger to others,
- 25 "and must not merely be the ordinary use of the land or such a
- "use as is proper for the general use of the community." And it is pointed out that *Lindley, L.J.*, in *Green v. Chelsea Waterworks Co.*(18) said of *Rylands v. Fletcher*: "That case is not to be
- "extended beyond the legitimate principles upon which the House
- 30 "of Lords decided it. If it were extended as far as strict logic
- "required it might be a very oppressive decision"(19).

- In New Zealand the fee-simple of roads is vested in the municipalities. In the English cases, to which reference has been made, corporations formed for profit have been carrying
- 35 their gas, electricity, or water over roads which are not vested in them. In those cases again, *prima facie*, the matter, the escape of which they have had to guard against, has been *per se* dangerous—that is to say, electricity, gas, or high-pressure water. It is, I think, possible to argue that roads are in New Zealand
- 40 being put to their normal use when they are used to convey water

(13) [1895] 1 Ch. 287.

(14) (1903) 22 N.Z.L.R. 683; 5

G.L.R. 294.

(15) [1936] A.C. 108.

(16) [1936] 3 All E.R. 200.

(17) [1913] A.C. 263.

(18) (1894) 70 L.T. 547.

(19) *Ibid.*, 549.

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to supply municipalities and that, *per se*, such water is not dangerous matter brought by municipalities on to its land. Again, *Lord Moulton*, in *Rickards v. Lothian*(20), says that the matter brought upon the land to be dangerous must not be only the ordinary use of land or *such a use as is proper for the general use of the community*.

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There are, again, those cases where it has been held that such water as may be brought on to premises for domestic purposes, if it escapes and injures other premises, does not render the owner of the pipes from which the water escaped liable under the principle of *Rylands v. Fletcher*. The distinction drawn, however, in *Western Engraving Co. v. Film Laboratories, Ltd.*(21), where more water than what was necessary for the normal purposes for which both plaintiff and defendants were occupying the premises rendered the person bringing such water liable for an escape upon the principle of *Rylands v. Fletcher*, leads me to the conclusion that water brought on to the roads in such bulk as was the case here must, *per se*, be regarded as a dangerous thing and bring this case within the principle of *Rylands v. Fletcher*.

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The final consideration pressed upon us was that the English cases were cases where the corporations were trading for profit. Here, the municipality was not. So far as I can see, that can make no difference to the construction of the statute once the provision is inserted, although it may provide a reason for its insertion, or exclusion, when the policy of the matter is under consideration. There seems to me no good reason to force the construction beyond its ordinary meaning because a single ratepayer, suffering loss through an escape of water that happens to be adjacent to his premises, has to have his loss made good by the ratepayers as a whole.

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These considerations, coupled with the fact that the authorization is permissive and not preemptory, so that the laying of the pipe cannot be considered a statutory duty as well as a benefit to the community, lead me to the conclusion that the plaintiff in this case is entitled to succeed under the doctrine of *Rylands v. Fletcher* and without proof of negligence.

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I think that I should add, in view of the propositions advanced by defendant, that, in my opinion, the New Zealand cases referred to do not establish a principle upon which transactions have been built, and vested interests created, and that being so there seems to me no good reason why, if we disagree with those decisions, they should stand. Again, I find no room in the statute

to entertain the proposition that the words of s. 173 have acquired, by repetition in successive Municipal Corporation Acts passed subsequent to the decisions referred to, a meaning other than that which they would otherwise bear.

5 *Lord Bowen in Truman v. London, Brighton, and South Coast Railway Co.*(22) says, of statutes such as that we are considering :

“An Act of Parliament may authorize a nuisance, and if it does

“so then the nuisance which it authorizes may be lawfully

“committed. But the authority given by the Act may be an

10 “authority which falls short of authorizing a nuisance. It may

“be an authority to do certain works provided that they can be

“done without causing a nuisance, and whether the authority

“falls within that category is again a question of construction.

“Again the authority given by Parliament may be to carry out

15 “the works without a nuisance, if they can be so carried out, but

“in the last resort to authorize a nuisance if it is necessary for

“the construction of the works”(23).

Section 173 is almost a model section with a recognized place.

Successive statutes relating to municipalities are closely scanned,

20 and indeed almost presented, by municipal associations. The

favourable interpretation placed upon s. 173 by various dicta

would not lead them to meddle with the section. They might

well leave it as it was, but that does not, in my opinion, entitle

us to disembowel the statute and take away from private

25 individuals the rights expressly reserved by the statute, unless

some very much stronger reason is advanced than those put

forward in argument before us.

In my opinion, considering the statute as a whole and the place

s. 173 takes in it, the Legislature must have intended the section

30 to carry its full weight. As I find myself in complete agreement

with the learned Chief Justice on these points, I think it

unnecessary to give further consideration to the authorities than

is given by him. Judgment, then, in my opinion, should

be entered for plaintiff for the amount of damages agreed upon.

35 FAIR, J. This appeal resolves itself into a question of the construction of ss. 171 and 173 of the Municipal Corporations Act, 1933, and the effect of the decisions that have been given in New Zealand on the corresponding sections in the preceding Municipal Corporations Acts.

40 The law as to the exercise of powers conferred by a statute which does not contain provisions corresponding to ss. 171 and

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173 is reasonably clear. "When Parliament has authorized a
"certain thing to be made or done in a certain place, there can be
"no action for nuisance caused by the making or doing of that
"thing if the nuisance is the inevitable result of the making or
"doing so authorized. The onus of proving that the result is
"inevitable is on those who wish to escape liability for nuisance,
"but the criterion of inevitability is not what is theoretically
"possible but what is possible according to the state of scientific
"knowledge at the time, having also in view a certain common-
"sense appreciation, which cannot be rigidly defined, of practical
"feasibility in view of situation and of expense": *Lord Dunedin*,
in *Manchester Corporation v. Farnworth*(1). Where the works
may be carried out either without committing a nuisance, or so
as to cause one, they must be carried out without causing a
nuisance: *Managers of Metropolitan Asylum District v. Hill*(2); *15*
Geddis v. Proprietors of the Bann Reservoir(3); and *Farrelly v.*
Pahiatua County(4).

The effect of the decisions is, I think, clear in the sense that I
have stated. Obviously a statutory command or authority to
carry out a work which must necessarily involve a nuisance, must,
in the course of conferring power to do that work, confer power
to commit such a nuisance. Where, however, there is no such
necessity the power cannot be implied. If it is to exist, it must
be conferred in express terms. 20

The authorities are clear, too, I think, that apart from a section
similar to that in s. 171 of the Municipal Corporations Act, 1933,
language corresponding to that of s. 173 would prohibit the
creation of a nuisance and preserve all remedies in respect of it :
Shelfer v. City of London Electric Lighting Co.(5); *Midwood*
and Co., Ltd. v. Manchester Corporation(6); *Charing Cross*
Electricity Supply Co. v. Hydraulic Power Co.(7); and
Scrutton, L.J., in Farnworth v. Manchester Corporation(8). The
same opinion is indicated in the judgments in the last-cited case
in the House of Lords, where *Viscount Dunedin* says: "Had
"the defendants been under a nuisance clause, they would have
"really exerted themselves to find a remedy; as it is, they are
"more likely to sit with their hands folded"(9). *Lord*
Blanesburgh says: "This case will have served a useful public
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(1) [1930] A.C. 171, 183.

(2) (1881) 6 App. Cas. 193.

(3) (1878) 3 App. Cas. 430.

(4) (1903) 22 N.Z.L.R. 683; 5
G.L.R. 294.

(5) [1895] 1 Ch. 287.

(6) [1905] 2 K.B. 597.

(7) [1914] 3 K.B. 772.

(8) [1929] 1 K.B. 533, 540; var.
on app. [1930] A.C. 171.

(9) [1930] A.C. 171, 180.

"purpose if, as its result, undertakers, when in the future they
 "approach Parliament with proposals similar to those embodied
 "in the 1914 Act, are required to show cause before their Bill is
 "allowed to pass why a nuisance clause or some other adequate
 5 "protection for those who may be injuriously affected by the
 "working of these great power-stations is not to be inserted
 "therein"(10).

But in considering these cases it is desirable to keep in mind
 the following passage in the judgment of the Privy Council in
 10 *North-western Utilities, Ltd. v. London Guarantee and Accident*
Co., Ltd.(11): "Where undertakers are acting under statutory
 "powers it is a question of construction, depending on the
 "language of the statute, whether they are only liable for
 "negligence or whether they remain subject to the strict and
 15 "unqualified rule of *Rylands v. Fletcher* (L.R. 3 H.L. 330)"(12).
 The judgment then cites the *Charing Cross Electricity Supply*
Co. case(13) and *Midwood's* case(14) as examples of the latter
 and two other cases as examples of the former rule.

Where the Legislature has authorized a nuisance and provided
 20 compensation, without a nuisance clause, no action lies: *London,*
Brighton, and South Coast Railway v. Truman(15) and *Farrelly v.*
Pahiatua County(16).

In the Municipal Corporations Act, 1933, powers are given
 to carry out many different works, some of which necessarily
 25 involve the creation of a nuisance in the course of their execution.
 Two examples are given by *Edwards, J.*, in *Lyttle v. Hastings*
Borough(17). He there says, referring to the Municipal Corpora-
 tions Act, 1908: "The statute authorizes the construction of
 "drains upon private lands. The very existence of such a drain,
 30 "which carries with it the right to enter upon the lands whereon
 "it is constructed in order to alter, renew, repair, or cleanse the
 "drain—s. 211 (3)—and interfering, as it does, with the right
 "of the owner to deal with his land, as he could before
 "do—*Jenkins v. Wellington City Corporation* (15 N.Z.L.R. 118,
 35 "127)—would certainly be a nuisance if the drain were not con-
 "structed under the authority of a statute"(18). He proceeds
 later: "It is quite certain that a tramway, with its centre poles,
 "which are no small obstruction to the traffic and are to some
 "extent an element of danger, would be a nuisance in the highway
 40 "if it were not constructed under statutory authority"(19). He

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(10) *Ibid.*, 207.

(11) [1936] A.C. 108.

(12) *Ibid.*, 120.

(13) [1914] 3 K.B. 772.

(14) [1905] 2 K.B. 597.

(15) (1885) 11 App. Cas. 45.

(16) (1903) 22 N.Z.L.R. 683; 5

G.L.R. 294.

(17) [1917] N.Z.L.R. 910; G.L.R.
 553.

(18) *Ibid.*, 917; 556.

(19) *Ibid.*, 917, 918; 556.

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then holds that s. 150 of the 1908 Act (which corresponds to s. 173 of the 1933 Act) does not apply to nuisances arising from the construction or carrying on of works authorized by statute for which compensation is provided by the section corresponding to s. 171 of the 1933 Act.

Section 173 reads as follows :—

Nothing in this Act shall entitle the Council to create a nuisance, or shall deprive any person of any right or remedy he would otherwise have against the Corporation or any other person in respect of any such nuisance.

According to its ordinary and natural meaning, this section, read by itself, preserves to every person who has been adversely affected by the creation of a nuisance caused by the execution of works authorized by the Acts all his legal rights and remedies existing apart from the Act. Its terms seem to be specifically directed to the preservation of the rights of private individuals, and not to be directed against public nuisances, although the words "any person" may include the Attorney-General proceeding on behalf of the public. At common law a person likely to be permanently adversely affected by the continuance of the nuisance is entitled in certain instances to a permanent injunction. If that right was intended to be preserved in all cases, it might, in the case of some works, prevent their construction and carrying on although it was a work authorized by statute. This seems the view to which *Cozens-Hardy, M.R.*, inclines in *Price's Patent Candle Co., Ltd. v. London County Council*(20), where he says : " . . . if the statute expressly confers a power but adds "a proviso that no nuisance must be created, it is no defence to say that the work, in truth, cannot be done without creating a "nuisance"(21). On the other hand, *Scrutton, L.J.*, in *Farnworth v. Manchester Corporation*(22), referring to a statutory authority authorizing a work but prohibiting the creation of a nuisance, says : "The result may possibly be that the nuisance, "being authorized, cannot or should not be stopped, but that "damage done by the nuisance must be compensated for by the "payment of proved damages. . . . The discretion of the "Court in granting injunctions may well be influenced by this "Parliamentary provision"(23). See also *Attorney-General v. Birmingham Borough*(24).

But the question of a permanent injunction does not arise in the present case, and I only advert to it as a factor that may have some bearing on the construction of s. 173.

(20) [1908] 2 Ch. 526.

(21) *Ibid.*, 544.

(22) [1929] 1 K.B. 533.

(23) *Ibid.*, 545, 546.

(24) (1858) 4 K. & J. 528; 70 E.R. 220.

It will be seen that the difficulty a literal reading of s. 173 creates is that of reconciling it with the exercise of statutory powers which have been expressly conferred, and which necessarily involve the creation of a nuisance. It could not have been intended to have conferred a power in one Part of the Act and to render it entirely nugatory by a provision in another part. The section must, therefore, be so construed as to give a meaning and effect to its provisions which does not nullify the powers conferred in the Act. It is clear that this necessitates some limitation of its literal meaning.

Three solutions of this difficulty have been suggested. The first is by confining the operation of the section to public nuisances only, and excluding from its operation private nuisances. But, as appears from the illustration of tramway-poles given by *Edwards, J.*, it may well be that some of the works authorized under the Act may be such that they must result in the creation of public nuisances. It appears, therefore, that some public nuisances might well be excluded from the operation of the section. Moreover, if the creation of some public nuisances are prohibited by the section, then it would appear that where a public nuisance is created a private individual suffering special damage from such a public nuisance should be entitled to bring his action himself and not by the Attorney-General on his relation. The second solution suggested is that loss for which compensation is provided under s. 171 should be excluded from the operation of s. 173. A third solution is that s. 173 should be confined to nuisances caused by the works after their execution. This last view does not seem to have been adverted to in the New Zealand cases, but may be implicit in the English decisions. It finds confirmation in the judgments in the Court of Appeal in *Shelfer v. City of London Electric Lighting Co.* (25).

The earliest authority relied on for the first construction suggested is a dictum contained in a judgment of *Prendergast, C.J.*, in *Bank of New Zealand v. Blenheim Borough* (26), in which he was considering s. 228 of the Municipal Corporations Act, 1876, which, except for slight immaterial verbal differences, is identical with s. 173. He there said: "It was contended by the plaintiff that this provision applies as well to private as public nuisances. I am inclined to think that it is intended to prohibit only public nuisances, and not such injuries as are general nuisances simply; this must be so if provision is made for compensating persons injuriously affected by the work. But however this may

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"be . . . "(27). It is to be noted that this is merely a tentative expression of opinion, and that the reason given for so limiting s. 228 is the provision for compensation which was contained in s. 180 of the 1876 Act, and which corresponds in all material particulars to s. 171 of the present Act. That section reads as follows : 5

Every person having any estate or interest in any lands taken under the authority of this Act for any public works, or injuriously affected thereby, or suffering any damage from the exercise of any of the powers hereby given, shall be entitled to full compensation for the same from the Corporation. Such compensation may be claimed and shall be determined in the manner provided by the Public Works Act, 1928. 10

The learned Chief Justice seems to have assumed that s. 180 covered all damage or loss suffered by any person as a result of the execution of the works. The statement is really founded on the view that s. 180 provides a specific remedy for all private nuisances and s. 228 must therefore be considered as applying only to public nuisances. 15

That this reasoning was the basis of the dictum was the view taken by *Edwards, J.*, in *Lyttle v. Hastings Borough*(28), where he says, after quoting the above passage : "In the passage which "I have cited he [*Prendergast, C.J.*] seems to have felt no doubt "that acts of the municipal Council which entitle persons whose "lands are injuriously affected to claim compensation cannot come "within the class of nuisances in respect of which liability "is preserved by s. 150. This, in my opinion, must be so"(29). 25 The same view seems to be taken by *Hosking, J.*, in *Fortescue v. Te Awamutu Borough*(30), where he says : "The circumstance "that the work was negligently or defectively designed or carried "out may increase the amount of compensation, but does not "entitle the person injured to seek his remedy by action if the "statute which authorized the work limits the remedy to "compensation : *Lyttle v. Hastings Borough* ([1917] N.Z.L.R. "910 ; G.L.R. 553)"(31). It is true that in the same case *Stout, C.J.*, says : "In the case of *Lyttle v. Hastings Borough*, 35 "it was held that the nuisance there [in s. 228] referred to was a "public nuisance, not a mere injury to a private owner"(32).

Bank of New Zealand v. Blenheim Borough(33) and *Lyttle v. Hastings Borough*(34) were considered in *O'Brien v. Wellington City Corporation*(35), decided in 1924, where *Stout, C.J.*, held 40

(27) (1885) N.Z.L.R. 4 S.C. 10, 12.

(28) [1917] N.Z.L.R. 910 ; G.L.R. 553.

(29) *Ibid.*, 917 ; 556.

(30) [1920] N.Z.L.R. 281 ; G.L.R. 214.

(31) *Ibid.*, 300 ; 223.

(32) *Ibid.*, 289 ; 218.

(33) (1885) N.Z.L.R. 4 S.C. 10.

(34) [1917] N.Z.L.R. 910 ; G.L.R. 553.

(35) [1928] N.Z.L.R. 215 ; [1925] G.L.R. 129.

that he must treat *Lyttle's* case as binding upon him in the Supreme Court because it had been acted upon and assumed to have been the law in New Zealand for many years. He further expressed his opinion that the decision in that case and the dictum of *Prendergast*, C.J., were right, " . . . for if it is to be con-
 5 "tended that an action may be brought for damages sustained
 "through the exercise of powers given by the statute because of
 "this s. 169 [of the Municipal Corporations Act, 1920—
 "corresponding to s. 173] it would mean that the words in s. 167
 10 "[corresponding to s. 171] are practically struck out. It cannot
 "be suggested that there could be two remedies—namely,
 "a remedy by action and for injunction, and also a remedy for
 "compensation for the same injury. Those sections must, if
 "possible, be read so as to be both effective, and I cannot see
 15 "how s. 167 can be effective if it is said that the words in s. 169
 "are to be given the wide meaning that is asked for by
 "the plaintiff. It is not the mere erection of a building that
 "entitles a person to damages under s. 167; it is the damage
 "arising from the exercise of any powers given by the statute.
 20 "The erection of the building or the erection of machinery is only
 "part of the powers; the main power given is to use the
 "machinery for the making of electric light. To erect a building
 "would be of little value if the Corporation when the building
 "was erected could not use the machinery within for the purpose
 25 "for which it was designed"(36).

It is to be noted that the main, and probably the sole, ground of the application for an injunction in *O'Brien's* case was an allegation of nuisance causing injury to *land*. The passage which I have cited from the judgment of the learned Chief Justice, and
 30 the fact that he adopted the passage in *Edwards*, J.'s, judgment which I have cited above, shows that he too proceeded on the assumption, as *Prendergast*, C.J., apparently did, that the provisions corresponding to s. 171 gave full compensation to all persons injured by the execution and carrying-on of the
 35 works authorized. It did not proceed on the basis that the language of s. 169 was limited to public nuisances, although the citation from his (*Stout*, C.J.'s) judgment in *Fortescue's* case(37), to which I have referred, appears to assume that this was the effect of both the decisions. That would be the effect if s. 171
 40 gave compensation for all injuries suffered by private persons as a result of nuisances caused by the execution of the works.

(36) *Ibid.*, 222; 133.(37) [1920] N.Z.L.R. 281, 289;
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(27) (1885) N.Z.L.R. 4 S.C. 10, 12. (32) *Ibid.*, 289; 218.

(28) [1917] N.Z.L.R. 910; G.L.R. 553. (33) (1885) N.Z.L.R. 4 S.C. 10.

(29) *Ibid.*, 917; 556. (34) [1917] N.Z.L.R. 910; G.L.R. 553.

(30) [1920] N.Z.L.R. 281; G.L.R. 214. (35) [1928] N.Z.L.R. 215; [1925] G.L.R. 129.

(31) *Ibid.*, 300; 223.

that he must treat *Lyttle's* case as binding upon him in the Supreme Court because it had been acted upon and assumed to have been the law in New Zealand for many years. He further expressed his opinion that the decision in that case and the dictum of *Prendergast*, C.J., were right, " . . . for if it is to be con-
 5 "tended that an action may be brought for damages sustained
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 "this s. 169 [of the Municipal Corporations Act, 1920—
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 10 "[corresponding to s. 171] are practically struck out. It cannot
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It seems, therefore, that the current of authority and the actual decisions are to the effect that *where a right of compensation is given for damage resulting from nuisances there is no remedy under s. 173*. That view has been, I think, authoritatively laid down in *Lyttle's case*(38), in *O'Brien's case*(39), in the judgment of *Hosking, J.*, in *Fortescue v. Te Awamutu Borough*(40), and in *Kirkcaldie v. Wellington City Corporation*(41).

But it is now well established that s. 171 of the Act, which is rather wider than the corresponding sections of the earlier Acts, applies only in respect of damage or injurious affection to land, and not in respect of damage to goods of, or personal injuries to, persons having an interest in the land upon which they are suffered: *Handley v. Minister of Public Works*(42); *Russell v. Minister of Lands*, *Sainsbury v. Minister of Lands*(43); *Hone te Anga v. Kawa Drainage Board*(44); and *Wood v. Taranaki Electric-power Board*(45). The last-mentioned case was decided on s. 94 of the Electric-power Boards Act, 1925, which corresponded exactly in its language to s. 171. It is to be noted that that section was amended by s. 16 of the Electric-power Boards Act Amendment Act, 1927, by substituting for the words "or suffering any damage from the exercise of the powers hereby given" the words "and every person suffering any damage whatever from the exercise of the powers conferred by this Act." It appears probable that the object of this amendment was to give a right of compensation for every kind of loss suffered as a result of the exercise of the powers, and remedy the omission which *Wood's case* had held existed in the section. Judgment was given by the Court of Appeal in that action on April 2, and the Amendment Act was passed on December 5 in the same year.

The question as to whether only cases for which compensation was provided by the compensation section were to be excluded from the nuisance section was not argued in either *Lyttle's case* or *O'Brien's case*, because in each of those cases there was a right to claim compensation under the Public Works Act. None of the decisions referred to this aspect of the matter, and therefore it may be argued that these decisions should not be regarded as authoritatively determining that s. 173 is confined to public nuisances. But, as I have said, the judgment of *Edwards, J.*,

(38) [1917] N.Z.L.R. 910; G.L.R. 553. (42) (1914) 16 G.L.R. 683.

(39) [1928] N.Z.L.R. 215; [1925] (43) (1898) 17 N.Z.L.R. 241; 1 G.L.R. 129. (44) (1914) 33 N.Z.L.R. 1139; 16 G.L.R. 15.

(40) [1920] N.Z.L.R. 281, 300; (44) (1914) 33 N.Z.L.R. 1139; 16 G.L.R. 214, 223. (41) [1933] N.Z.L.R. 1101; G.L.R. (45) [1927] N.Z.L.R. 392, 404; 719. G.L.R. 235, 241.

- in *Lyttile's* case(46) clearly implies that he thinks the section should be so read, and *Stout*, C.J., in *Fortescue's* case(47), stated that to be the effect of *Lyttile's* case. In *O'Brien's* case he clearly indicated the same view. In *Kirkcaldie v. Wellington City Corporation*(48), *Ostler*, J., says, referring to *Lyttile's* case and *O'Brien's* case: "Both decide that s. 169 of the Municipal Corporations Act, 1920, prohibits only the creation of a public nuisance. Moreover, they decide that the section does not relate to nuisances for which compensation has been provided."
- Those decisions would have been binding on me, even if I had disagreed with them. But, in my opinion, the reasoning upon which they are based is uncontrovertible. In the view I take, even if the nuisance created does amount to a public nuisance, if the Corporation had taken away the plaintiff's rights in accordance with the provisions of the Public Works Act, his only remedy would have been a claim for compensation"(49). That judgment was delivered on August 5, 1933, and the Municipal Corporations Act, 1933, was passed on December 20 in that year.
- These judgments concern matters of great public and general interest, and it must be assumed that they were known to the Legislature when it passed the 1933 Act. The question as to whether they should be regarded as constituting an authoritative interpretation of the meaning of the language contained in the sections construed which was adopted by Parliament in enacting s. 173 is not free from difficulty. The decisions bearing upon it have been collected and carefully examined by *Callan*, J., in *In re Otago Clerical Workers' Award*(50), and it appears unnecessary for me to refer to them in detail. He there cites the passage from *Lord Macmillan's* judgment in *Barras v. Aberdeen Steam Trawling and Fishing Co., Ltd.*(51), which, referring to the statement of the rule of construction, says: "I prefer the later form in which James, L.J., himself restated his rule in the case of *Greaves v. Tofield* ((1880) 14 Ch.D. 563, 571), as follows: 'If an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject and passed with the same purpose, and for the same object, the safe and well-known rule of construction is to assume that the Legislature when using well-known words upon which there

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(46) [1917] N.Z.L.R. 910, 916; (49) *Ibid.*, 1115; 726.

G.L.R. 553, 555.

(50) [1937] N.Z.L.R. 578, 663 *et*

(47) [1920] N.Z.L.R. 281, 289;

G.L.R. 214, 217, 218.

seq.; G.L.R. 388, 429.

(51) [1933] A.C. 402.

(48) [1933] N.Z.L.R. 1101; G.L.R.

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"have been well-known decisions uses those words in the sense
"which the decisions have attached to them.' To the rule as
"so stated, I am prepared whole-heartedly to subscribe"(52).

In *Robinson Brothers (Brewers), Ltd. v. Durham County Assessment Committee*(53), Lord Macmillan, delivering a judgment in which the other members of the House concurred, said :
"It was also sought to found an argument on the principle
"recently considered by this House in the case of *Barras v. Aberdeen Steam Trawling and Fishing Co.* ([1933] A.C. 402),
"to the effect that where Parliament in re-enacting legislation
"uses language which has been the subject of judicial interpretation,
"it must be presumed to have used that language in the
"sense in which it has been judicially interpreted. I ventured
"in the case I have just cited to suggest some obvious limitations
"of the scope of the doctrine. I recognize that where a term
"or expression which has an established judicial connotation
"occurs in a statute, Parliament may well be taken to have
"employed it in conformity with thus usage. But it would be
"reducing the doctrine to an absurdity to hold that Parliament
"in repeating in the Act of 1925 the general terms used in the
"Act of 1836 to define annual value, thereby gave Parliamentary
"sanction to every one of the innumerable and not always consistent
"decisions on the subject of hypothetical tenant and the
"rent which he may be reasonably expected to pay"(54).

With regard to the application of this principle to the present case, I need only say that, in my view, that the only definite judicial pronouncements that the application of the sections in Municipal Corporations Acts corresponding to s. 173 was restricted to public nuisances are the judgment of the Chief Justice in *Fortescue's* case and the *obiter dictum* of *Ostler, J.*, in *Kirkcaldie's* case. These do not, in my opinion, amount to such an authoritative and well-known judicial construction as is contemplated by the principle.

This being so, s. 173 should, I think, be construed in accordance with the decisions in England upon "nuisance," provisions which are, in substance, to the same effect as the section. In *Midwood and Co. v. Manchester Corporation*(55) and *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*(56) it was held by the Court of Appeal that such a provision preserved the previously existing right of action for nuisance arising from the carrying-on of the works authorized. The judgment

(52) [1933] A.C. 402, 447.

(54) *Ibid.*, 340; 87, 88.

(53) [1938] A.C. 321; [1938] 2 All E.R. 79.

(55) [1905] 2 K.B. 597.

(56) [1914] 3 K.B. 772.

ment of *Lord Wright*, M.R., in *Collingwood v. Home and Colonial Stores, Ltd.*(57), confirms the view that the escape of water from a main falls within the doctrine of *Rylands v. Fletcher*(58), and *Midwood's case*(59) is authority that the carriage or accumulation
 5 of a dangerous thing in mains, even though for the general benefit of the community, does not exempt a local body from liability. The decisions in the *Midwood* and the *Charing Cross* cases appear to me directly applicable to the present case. Moreover, such a
 10 construction accords with the well-established principle that it is the duty of a Court, in the interpretation of statutes, to adopt, if possible, that interpretation which preserves private rights: *Fitchett v. Wellington City Corporation*(60) and the cases therein cited. I think, therefore, that the plaintiff is entitled to succeed in his claim.

Judgment for the plaintiff.

Solicitors for the plaintiff: *Brash and Thompson* (Dunedin).

Solicitors for the defendant: *Ramsay and Haggitt* (Dunedin).

(57) [1936] 3 All E.R. 200, 208.

(59) [1905] 2 K.B. 597.

(58) (1868) L.R. 3 H.L. 330.

(60) (1907) 27 N.Z.L.R. 193.

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HAWKE'S BAY DRIVERS' AND RELATED TRADES INDUSTRIAL UNION OF WORKERS *v.* SAME.

O'REGAN, J. *Contract—Co-operative Contract between a Single Contractor and River Board—Contract, complete and clear on Face, providing that no Contractual Relationship existed between Workmen and Board—Construction—Relationship of Independent Contractor.*

Where a co operative contract for work made between a Board and L., signing as "contractor," was complete and clear on its face, and contained, *inter alia*, provisions to the effect that the work should be deemed to be carried out on a contract between the contractor and the Board only, and that none of the workmen should be deemed to have any contractual relationship with the Board, L. was held to be an independent contractor.

An agreement, signed by all the men employed by L., by which they agreed to associate themselves with him on the works on the terms set out in the contract between L. and the Board, and containing the following:

"This agreement is made between us and you and each of us
"and is not the concern of nor to bind the Hawke's Bay Rivers Board,"
was held to show that, in the contemplation of the men themselves, L. was an independent contractor, and that the relationship of the Board and the gang of men was not that of master and servant.

In re Manawatu Flaxmillers' Award(1); *Lawless v. The King*(2);
and *Birss v. The King*(3), applied.

Solomon v. The King(4) distinguished.

(1) (1909) 12 G.L.R. 102.

(2) (1909) 12 G.L.R. 327.

(3) [1923] N.Z.L.R. 1058; [1924] G.L.R. 179.

(4) [1934] N.Z.L.R. 1; G.L.R. 23.

APPEAL from a decision of Mr. J. Miller, S.M., Napier, in respect of two claims arising out of alleged breaches of the Hawke's Bay Rivers Board Labourers' Industrial Agreement, dated December 6, 1937 ((1937) 37 *Book of Awards*, 2850). Both cases were heard together on February 23, 1938, and they were founded on allegations, first, that while bound by the said agreement, the defendant Board employed and failed to pay two labourers, Charles Hodgson and Charles Nihill, the prescribed minimum wage, £4 10s. per week; also, in the second action, that in contravention of the New Zealand Local Bodies Drivers' Award ((1936) 36 *Book of Awards*, 1460), to which the said Board was a party, it employed

and failed to pay Stanley Skews, a driver, the prescribed minimum wage, £4 13s. 6d. per week, and overtime.

The Magistrate held that there was no contract of service as between the defendant Board and the said workers, but that they
5 were employed by one, R. J. Little, between whom and the Board there subsisted an independent contract, and hence that the breaches alleged had not been committed.

L. W. Willis, for the respondent.

Cur. adv. vult.

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10 The judgment of the Court was delivered by

O'REGAN, J. At the hearing by this Court on December 5, 1938, Mr. H. Kay, Secretary of the Hawke's Bay Builders' and General Labourers' Industrial Union of Workers, who appeared in support of the appeal, attacked the Magistrate's decision on
15 grounds other than those on which the cases were founded, holding that the evidence disclosed a combination on the part of the Board and the alleged contractor to defeat the award, contrary to the provisions of s. 111 of the Industrial Conciliation and Arbitration Act, 1925, and hence that a breach of both industrial agreement
20 and award had been established on that ground. This Court pointed out at the time, however, that it was not open to an appellant to allege any ground not taken in the Court below, and that, as proceedings had not been taken for any alleged contra-
vention of s. 111, the provisions thereof could not be invoked
25 before the appellate tribunal.

It is true that on the date of the alleged breaches the defendant Board was a party to the said industrial agreement and award. The question in issue is whether the workers in respect of whom proceedings were invoked were employed thereunder by the Board
30 or whether they were in fact employed by an independent contractor. The facts appear clear enough, and the real matter in dispute is the proper legal inference to be drawn therefrom. The Board put in hand a scheme for the erection of a series of stop-banks along either side of the Ngaruroro River for preventing
35 the overflow of flood-waters, and one of the incidental objects of that scheme was the provision of work for the unemployed; indeed so dominant was this consideration that the use of certain labour-saving machinery was deliberately avoided. The banks or levees were composed of soil excavated and carried from the river-side.
40 Four gangs of men—styled by the Board's engineer "contract
"gangs"—were engaged on each bank, and to each was assigned

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a defined section of the work. The work purported to be done under contract. The Board's engineer prepared a plan and a bill of quantities for each section—that is to say, for each alleged contract. An estimate was made of the quantities to be excavated and shifted, and thus the cost of each section was arrived at, the object being to ensure each man a reasonable wage. Thereafter an officer of the Board negotiated with the men, and, when a price had been agreed upon, what purported to be a written contract, prepared by the Board's legal adviser, was made and signed by both parties. The work to be done is fully described in the document, and plans and specifications are attached, just as if a contract had been made in response to public invitation for tenders.

The labourers employed, including apparently the contractor for each section of work himself, were (and no doubt are) members of the Hawke's Bay Builders' and General Labourers' Industrial Union of Workers, and it is evident that the union considers that it is not legally competent for its members to become parties to an independent contract. This much seems clear from the following letter (dated January 21, 1938) addressed by Mr. Kay to the Board's engineer when the proposed scheme was in contemplation :—

Recently a copy of the new contract which you propose to have cover the river diversion works was placed before our union and the Drivers' Union. I have to advise that both unions have given their members definite instructions that no such contract is to be signed until they have perused and endorsed same. I feel that I must make one point perfectly clear.

Under no consideration whatever will our union allow its members to work on a co-operative contract basis except as provided for under the industrial agreement which was recently signed. The agreement is between the Board and the union, and therefore any contract entered into with the men must be between the men as a whole, and not between any individual contractor and the Board.

I understand, further, that one gang are supposed not to have earned the minimum rate provided for in the agreement (£4 10s. per week), and that you propose making up the amount to £4 5s. Whether this is authentic or not I am not yet certain, and will know the actual circumstances when I receive a report on the actual amount drawn by the men concerned.

I think that it should be made clear to the Board and yourself that, for the purpose of assessing the weekly minimum wage, each week must stand by itself. Therefore, if the men do not earn the £4 10s., either through hard going or wet weather, the Board will have to make the amount up to the minimum wage provided for in the agreement. The amount necessary for this purpose cannot be taken out of the contract price, nor out of any particular contract.

It seems as if the two unions will have to take a case to the Arbitration Court, in order to obtain a clear definition of the Board's responsibilities in respect of awards and agreements, not only regarding the remainder of the diversion scheme, but also in respect to the work done during the past twelve months.

If there is any claim for arrears of wages arising out of the decision of the Court, then both unions will have to issue a summons for recovery of the amount due.

We regret very much the fact that the Board appears to be determined to flout both the Drivers' Award and the agreement it made with our union.

It is clear from what follows that the only party to each contract was the man who signed as contractor. Whether the contract could be described properly as a co-operative contract need not here be discussed, but if the men were employed by the contractor they were strangers to the Board. Apart from that consideration altogether, however, it is beyond doubt that members of an industrial union are not precluded from entering into independent contracts. That has been made clear by decisions of this Court. For example, *In re the Manawatu Flax-millers' Award*(1) is an apt illustration of this fact. There, two men, Broad and Reeve, employers bound by the award, entered into a written contract with four workers, members of the union bound by the award, whereby they agreed that during a time prescribed they would do all the stripping at the Kea Flaxmill, Oroua Bridge, at the rate of 3s. 8½d. per ton of green flax cut and used at the mill. The question was whether the contract was valid, although under its provisions the contractors might earn less than the prescribed minimum wage. The judgment (per *Sim, J.*) was to the effect that there was a valid independent contract and no breach of the award, even if the contractors' earnings were below the minimum wage. Accordingly, it is quite clear and settled by authority that, even though he is a member of the union, it was competent for Little to become a party to a contract with the defendant Board, and, if there was in fact an independent contract, the relationship of master and servant existed as between him and the men he employed, and the Board, as principal, could not be the employer of these workers.

There are three reported cases in which the legal effect of co-operative contracts was under consideration, and, as these have been repeatedly mentioned in the course of the argument, they may here be reviewed. In *Lawless v. The King*(2), a party of men had entered into a contract with the Crown for the formation of a section of railway track. The contract was in writing, and the parties were referred to therein as "the contractors." The prices payable to them were specified in the schedule called "the contract." Certain specified materials were to be supplied by the Public Works Department, and all other materials by the contractors. Payments were to be made monthly for the full value of the work done. There were provisions restricting the hours of work and giving the officer-in-charge power to discharge any member of the party for incompetency, neglect of duty, or other misconduct or breach of the conditions, and to increase or

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decrease the number of men in the party. Moreover, the Department had power to stop the works at any time. Thus, it will be seen that the terms included many provisions indicating a contract of service, but—and this is important—the contract was written or printed and signed. The party engaged a man 5
named John Scholes at 12s. per day to provide a horse to draw trucks used in the work, and Scholes employed a youth named Patrick Lawless at 6s. per day to drive the horse. Lawless was killed by accident arising out of and in the course of his employment, and his parents claimed compensation. The question for 10
this Court (per *Sim*, J.) was whether the parties were independent contractors, in which case the Crown would be liable as principal under s. 13 of the Workers' Compensation Act, 1908, and it was held that the parties were independent contractors.

The next case is that of *Birss v. The King*(3). There, a party 15
of twelve men entered into an agreement with the Crown for the construction of a tunnel, and several of them were later killed by the inhalation of noxious fumes. The contract form used was that regularly utilized by the Public Works Department in an ordinary contract with a contractor who employed labour. The 20
contract included a clause whereby the men bound themselves to insure against accident with the Government Accident Insurance Department and to indemnify the Crown against accident liability for any one employed by the party, such indemnity covering the liability imposed by the Workers' Compensation Act, 25
the Deaths by Accidents Compensation Act, or by common law, and an insurance contract was duly made by the party with the State Accident Department whereby each man was covered to the extent of £800 with a disaster limit of £4,000, in consideration of which the premium was reduced. The mother of one of the 30
deceased took proceedings under the Crown Suits Act and the Deaths by Accidents Compensation Act, alleging that the accident was due to negligence on the part of the Crown's servants. An agreed case was stated for argument in the Supreme Court, and *Salmond*, J., held that a claim for damages could not be maintained. 35
The relevant point in that case for our present consideration is that, though the parties called themselves a party of co-operative contractors, it was held that they were independent contractors, and, indeed, it seems clear that, as between themselves, they might properly have been described as partners. 40

Finally, we come to *Solomon v. The King*(4). There, a party of 115 men had entered into an agreement with the Crown to do

certain road-work in connection with the Waitaki Hydro-electric Dam. The terms under which the men worked were set out in a printed document supplied by the Department, and that document was signed by one, Hickey, on behalf of the other members of the party. The document was headed "Co-operative Road Contract," and the signatory thereto was referred to throughout as "the contractor," but he was also referred to in certain of the clauses as "the headman" or "the ganger." All the members of the party, including Hickey, stood on a footing of equality in the matter of earnings, and there were provisions to ensure that neither more nor less than the rate of wages prevailing in the district should be earned. The work was carried on under the supervision of a departmental engineer, who was the sole arbiter in any dispute, and he had the right of dismissal in certain events. Solomon, a member of the party, having been killed by accident, his widow claimed damages under the Deaths by Accidents Compensation Act, alleging that the accident was due to the negligence of a fellow-worker. The case came before *Kennedy, J.*, and a jury at Timaru in February, 1933, when the jury found in favour of the suppliant; but, on further consideration, His Honour found that the verdict could not stand in that the deceased was a member of a party of independent contractors. The case was taken to the Court of Appeal, and that tribunal (*Myers, C.J.*, and *Ostler and Smith, JJ.*, *MacGregor, J.*, dissenting) found in favour of the suppliant. In that case, as here, certain of the clauses in the document indicated an independent contract and others a contract of service, but it was held that the deciding factor was the question of control, and that it was clear that the degree of control exercised by the departmental engineer was consistent only with a contract of service. It was pointed out, however (by *Myers, C.J.*(5)), that even if the document were ambiguous there were certain relevant facts not referred to therein, but proved in evidence, which were inconsistent with an independent contract in that (i) pursuant to the National Expenditure Adjustment Act, 1932, the Department deducted 5 per cent. from the earnings of the men, which it was not entitled to do save in the case of employees on wages or salary; (ii) that after the coming into operation of the Unemployment Amendment Act, 1931, the Department made the prescribed deductions from the earnings of the men; and (iii) that, for the purposes of the Workers' Compensation Act, the men were treated as workers, and in this last connection His Honour the Chief Justice was emphatic that it was impossible for the Department to allege an independent contract in answer to a claim for

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damages while liability was admitted—as it was in *Solomon's* case—pursuant to the Workers' Compensation Act. It is to be noted that *Lawless v. The King*(6) was not overruled by the Court of Appeal in *Solomon's* case, but distinguished.

A perusal of the three cases hereinbefore quoted shows that such terms as "co-operative contract" and "contractor" in this connection are neutral terms; that in every case the whole of the facts must be looked at; and that a co-operative contract may mean an independent contract as in the *Lawless* case and the *Birss* case(7), or a contract of service as in the *Solomon* case(8). Further, it is to be noted that in that case, unlike that now under consideration, each member of the party of 115 was held to be employed under a separate contract of service.

Coming now to the alleged contract under consideration. It seems beyond question that the draftsman who prepared the document bore the *Solomon* case in mind, in that the whole of the terms under which the work was let to Little are set out in the writing. As there are no ambiguous terms, no evidence was admissible to explain the meaning of the writing or any part thereof. No evidence was called to show, nor was it even suggested, that Little had signed the document under duress or as the result of misrepresentation. It is obvious that the document includes clauses ordinarily indicative of a contract of service. Such, for example, are the clauses providing for the payment for death or injury pursuant to the Workers' Compensation Act, the super- vision by the engineer, the deduction of unemployment tax, &c. Had these matters not been provided for in the document, evidence could have been given of them at the original hearing, and it could have been, and doubtless would have been, argued, as in *Solomon's* case, that they were proof of a contract of service. That they have been expressly set out in the document, however, makes all the difference. Short of illegality the law places no limitation on freedom of contract, and hence it is always competent for any person to agree by independent contract to do that which ordinarily indicates a contract of service. Accordingly, we must hold on principle as well as authority that Little was an independent contractor. Were there any doubt in this connection, it must be finally dispelled by perusing the agreement signed by the men employed by Little—twenty-six in all—on November 9, 1937:

We, the undersigned, hereby agree to be associated with you as co-operative contractors in the performance of the works set forth and described in the annexed contract and specifications which is to be entered

(6) (1909) 12 G.L.R. 327.

(8) [1934] N.Z.L.R. 1; G.L.R. 23.

(7) [1923] N.Z.L.R. 1058; [1924]

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into between you and the Hawke's Bay Rivers Board and we agree to engage on the said works on the terms and under the conditions set forth in the said annexed contract and specifications. This agreement is made between us and you and each of us and is not the concern of nor to bind the

5 Hawke's Bay Rivers Board.

It is no more competent for the men who signed the foregoing to repudiate their agreement than it is for the contractor, Little, himself. The contract itself is complete on the face of it, and the agreement we have quoted shows that in the contemplation of the

10 men themselves he was an independent contractor. It is true there is uncontradicted evidence that on one occasion the Board's engineer dismissed a number of the men. That fact is certainly inconsistent with an independent contract, and the appellant naturally cites it in support of his case. The reply is that the

15 engineer committed a breach of the contract. Obviously, however, a breach cannot affect the validity of a contract already entered into, and the act of the engineer merely illustrates the fact that a contract is sometimes broken. Accordingly, the appeal is disallowed, and leave is reserved to the respondent Board to apply for costs.

Appeal dismissed.

Solicitors for the respondent: *Kennedy, Lusk, Morling, and Willis, Napier.*

[IN THE SUPREME COURT.]

In re WAIOHIKI BLOCKS, NATIVE OWNERS *v.*
HAWKE'S BAY RIVERS BOARD.

Natives and Native Land—Public Works—Native Land taken for Public Works—Appeal from Final Order of Native Land Court awarding Compensation—Time—Date from which Variation by Appellate Court effective—Date from which Interest payable on Amount so varied—Public Works Act, 1928, ss. 104, 106—Native Land Act, 1931, ss. 64–66.

Part IV of the Public Works Act, 1928, relating to the taking of Native land for public works and the ascertainment of compensation therefor, provides for an appeal from a final order of the Native Land Court awarding a sum of compensation; and, for the purposes of appeal, such an order is an order within Part II of the Native Land Act, 1931, establishing and regulating the Native Appellate Court and its orders. Sections 64, 65, and 66 of that statute, dealing with variation of orders of the Native Land Court by the Native Appellate Court, apply, therefore, to an order of the Native Appellate Court made under s. 106 of the Public Works Act, 1928. Consequently, an order so varied must be deemed to be and remain an order of the Native Land Court, and the variation takes effect from the same date as if the order had been made by the Native Land Court.

Hence, in the case of orders appealed from and varied by reduction of the amount of compensation, and of orders not varied by the Native Appellate Court, interest is payable on the reduced amount or on the original amount as the case may be from the respective dates of the orders of the Native Land Court.

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ORIGINATING SUMMONS for an order determining the date from which interest was payable (a) on certain awards of compensation-moneys by the Native Land Court under s. 104 of the Public Works Act, 1928, which were upheld by the Native Appellate Court, and (b) on certain other awards by the Native Land Court under the same section which were reduced by the Native Appellate Court. 5

The defendant Board, by Proclamation published on October, 29, 1936, under the Public Works Act, 1928, took certain Native Lands for the purposes of river-works. These lands are parts 10 of the blocks known as Waiohiki 1E 3, 1E 4, 1E 5, 1E 6, 1E 7, 1D 2B 11, 1D 2B 15, 1D 2B 16, 1D 2B 17, and 1D 2B 18. (The owners of 1E 4 and 1E 5 were by consent added as plaintiffs at the hearing.) Pursuant to s. 104 of the Public Works Act, 1928, the Native Land Court on October 1, 1937, awarded the plaintiffs 15 the sum of £2,951 by way of compensation. The defendant Board appealed, and the Native Appellate Court on April 2, 1938, varied the awards of the Native Land Court in respect of Waiohiki 1D 2B 15, 1D 2B 16, 1D 2B 17, and 1D 2B 18. In all, these awards were reduced by the sum of £293. All other awards were upheld. 20

On July 7, 1938, the defendant Board paid the total amount of compensation—viz., £2,658—being the original amount awarded by the Native Land Court less the deductions ordered by the Native Appellate Court. Relying on s. 104 (1) (d) of the Public Works Act, 1928, the plaintiffs applied to the defendant Board 25 for the payment of interest on the total amount paid by the Board as from November 1, 1937, being one month from the date judgment was delivered by the Native Land Court. The defendant Board declined to accede to this application. It contended that, where an appeal is brought, interest is not payable 30 on any award until the decision of the Native Appellate Court has been given.

The questions asked in the originating summons appear in the judgment.

Dowling, for the plaintiffs.

35

L. W. Willis, for the defendant.

Cur. adv. vult.

SMITH, J. [After stating the facts, as above:] The first question concerns the nature of the order of the Native Land Court made under s. 104 of the Public Works Act, 1928. Is it an order 40 which is subject to Part II of the Native Land Act, 1931, and so

subject to the provisions of s. 65 of that Act, which regulate orders of the Native Land Court when varied on appeal?

- As it exists to-day, s. 104 of the Public Works Act, 1928, comprises s. 91 of the Public Works Act, 1908, with various
 5 amendments. Prior to the year 1910, the award was not expressed to be final in any respect. By s. 13 of the Public Works Amendment Act, 1910, the words "and its award shall be final as regards
 "the amount awarded" were added to s. 91 (c). They
 now appear at the end of s. 104 (1) (c) of the Act of 1928. This
 10 position continued until the passing of the Native Land Amendment and Native Land Claims Adjustment Act, 1927, which, by s. 15 (1), provided as follows:—

- Notwithstanding anything to the contrary contained in the Public Works Act, 1908, or its amendments, an appeal shall lie to the Appellate
 15 Court from any final order of the Court made under section ninety-one of the said Act both as regards the amount of compensation awarded and the right or title of any person to be paid such compensation or any part thereof.

- This subsection now appears as s. 106 of the Public Works Act, 1928. The giving of the right of appeal involves the inference
 20 that the word "final" in s. 104 (1) (c) has changed its meaning. It could no longer mean that there was no appeal as regards the amount awarded. It could only mean that the order must be final as opposed to interlocutory before an appeal could be brought. There is another inference to be drawn from s. 106.
 25 Its phraseology shows that prior to its first enactment in s. 15 (1) of the Native Land Amendment and Native Land Claims Adjustment Act, 1927, there was an appeal from an order of the Native Land Court as regards the right or title of any person to be paid compensation. That indicated that the order was one made in
 30 the ordinary jurisdiction of the Court for that purpose. Thenceforth there was to be also a right of appeal as regards the amount of compensation awarded. That made the whole order appealable and, in my opinion, rendered it an order of the Native Land Court which must be regarded as made in its ordinary jurisdiction for
 35 the purposes of appeal.

- Mr. *Willis* submitted that the Court should not draw this conclusion, because s. 104 (1) (c) refers to the "award" and s. 104 (1) (d) to the "sum awarded," and he submitted that the mere granting of an appeal would not make applicable the
 40 provisions of ss. 65 and 66 relating to orders of the Native Land Court when varied or otherwise dealt with by the Native Appellate Court. This argument cannot stand against the fact that the authority in s. 104 (1) (a) is to make "such order or orders as to
 "it seems fit," that s. 104 (1) (d) speaks of "the making of the

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"order of Court," that s. 105 (2) refers to "an order for payment of compensation," and that s. 106, which gives the right of appeal, speaks of "any final order of the Court made under s. 104," and thereby treats the words of s. 104 (1) (c)—viz., "its award shall be final"—as equivalent to "any final order." 5

In my opinion, the legislation in its present form provides for an appeal from a final order of the Native Land Court awarding a sum of compensation, and for the purposes of appeal such an order is an order within Part II of the Native Land Act, 1931, establishing and regulating the Native Appellate Court and its 10 orders. Sections 64, 65, and 66 of that Act therefore apply to an order of the Native Appellate Court made under s. 106 of the Public Works Act, 1928.

Section 65 is as follows :—

(1) When an order of the Native Land Court is varied by the Appellate Court it shall, as so varied, be deemed to remain and be an order of the Native Land Court, and the variation thereof shall take and be deemed to have taken effect from the same date as if the order had been originally made by the Native Land Court in that form. 15

(2) When an order of the Native Land Court is varied by the Appellate Court, the order as so varied shall be drawn up as an order of the Native Land Court, and shall be sealed with the seal of that Court and signed by the presiding Judge or by the Chief Judge, and shall bear the same date as if no such appeal and variation had taken place; and the order as so drawn up shall supersede and take the place of the order as originally made, whether that order has been already drawn up, sealed, and signed, or not. 20 25

In the present case the Native Appellate Court has specifically stated in its decision that in making its deductions it has "varied" the orders of the Native Land Court. I am well content to take the description given by the Native Appellate Court of the operation of its own order in relation to the orders of the Native Land Court. I conclude that, pursuant to s. 65, the orders varied must be deemed to be and remain orders of the Native Land Court, and the variations take effect from the same date as if the orders had been made by the Native Land Court. It follows that interest on the varied orders is payable from one month after the date of the Native Land Court order—viz., as from November 1, 1937. 30 35

With respect to the orders not varied by the Native Appellate Court, there is no difficulty. Those orders stand and interest is payable from one month after the date of such orders—viz., as from November 1, 1937. 40

In reaching these conclusions, I have considered the submission made by Mr. Willis that the Rivers Board, having appealed, could not be expected to pay interest until it finally knew, from the decision of the Native Appellate Court, the amount on which it had to pay interest. The answer is that when the Rivers Board 45

brought its appeal, it must be taken to have known that s. 65 of the Native Land Act, 1931, would apply upon a variation of the order by reduction of the amount of compensation. If the argument *ab inconvenienti* be applicable, it is necessary to
 5 remember that the Native owners lost their legal right to the land when the Proclamation was published—*viz.*, on October 29, 1936. Where they are not allowed more on appeal than they obtained from the Native Land Court, there is no reason in convenience or justice in denying them the right to interest as from the date they
 10 would have obtained it under the orders made by the Native Land Court.

If, on appeal, the amount of compensation were increased by the Native Appellate Court, a different question would arise. In this proceeding, I am not required to consider that question or to
 15 construe s. 104 (1) (d) (concerning the payment of interest) with s. 66 of the Native Land Act, 1931 (concerning orders of the Native Appellate Court which are not variations of an order of the Native Land Court).

The answer to the question asked is that interest is payable
 20 on the amount of compensation awarded to the owners of the various blocks, whether upheld or varied by the Appellate Court, as from the expiration of one month after the date of the order of the Native Land Court. The defendant will pay the plaintiffs the sum of £7 7s. for costs and, in addition, the fees of Court.

Questions answered accordingly.

Solicitor for the plaintiffs: *A. E. Lawry* (Napier).

Solicitors for the defendant: *Kennedy, Lusk, Morling, and Willis* (Napier).

TAURANGA ELECTRIC-POWER BOARD *v.* KARORA KOHU *ET UX.*

Negligence—Infants and Children—Minors of Fourteen Years and Upwards—Traffic Regulations—Standard of Care required—Traffic Regulations, 1936 (Serial No. 86/1936), Reg. 22 (2) (5) (6).

The same standard of care in the observance of traffic regulations is required of every normal minor of fourteen years and upwards as of an adult.

Canning v. The King(1) and *The King v. Storey*(2) applied.

So held, by the Court of Appeal, ordering a new trial, on appeal from the judgment of *Fair, J.*, who dismissed a motion for a new trial on, *inter alia*, the ground that there had been misdirection as to what constituted contributory negligence on the part of the seventeen-year-old son of the respondents killed in the accident, and alternatively for judgment for the defendant *non obstante veredicto*, or for nonsuit.

(1) [1924] N.Z.L.R. 118; [1923] G.L.R. 595. (2) [1931] N.Z.L.R. 417; G.L.R. 105.

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In re

WAIHOKI
BLOCKS,
NATIVE
OWNERS

v.

HAWKE'S
BAY
RIVERS
BOARD.

SMITH, J.

C.A.

WELLINGTON

1939.

Sept. 27, 28;
Oct. 10.

MYERS, C.J.
OSTLER, J.
SMITH, J.
JOHNSTON, J.

C.A.
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TAURANGA
ELECTRIC-
POWER
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v.

KARORA
KOHU *Et Uz.*

APPEAL from a judgment of *Fair, J.*, dismissing a motion by the appellant Board (defendant in the Court below) for an order for a new trial, and alternatively for judgment for defendant notwithstanding the verdict, or for nonsuit.

The respondents were a Maori and his wife, whose seventeen-year-old son was killed while riding a bicycle by coming into collision with a motor-truck driven by one, Davidson, an employee of the appellant Board, near Tauranga, about 10 a.m. on June 17, 1938. They brought an action against the Board claiming damages in respect of their son's death under the Deaths by Accidents Compensation Act, 1908, alleging that his death was caused by the negligence of Davidson. In their statement of claim they alleged that Davidson was driving a truck belonging to the Board towards Tauranga on the Waihi-Tauranga Road and "at the same time deceased was riding a bicycle from the Judea side Road on to the aforesaid Waihi-Tauranga Road" when the collision occurred. No less than six species of negligence were alleged, but, according to the judgment, the only ones relied on at the trial were that Davidson was travelling at an excessive speed, that he failed to keep as close as practicable to the left of the road, and that he failed to keep a proper look out. The Board denied that there was any negligence on the part of Davidson, and alleged that the accident was caused by the negligence of the boy in suddenly emerging from a side road into the main road on his wrong side of the road, cutting the corner in an endeavour to turn to his right, and disobeying the right-hand regulation, which required him to give way to traffic approaching from his right. The Board also pleaded contributory negligence on the part of the boy.

The jury found a verdict in favour of the plaintiffs, and awarded them £580 damages.

After the jury had returned its verdict, Mr. *Cooney* moved for judgment for the plaintiffs and Mr. *Meredith* for judgment for the defendant. Both motions were reserved. The defendant subsequently filed a motion that judgment be entered for the defendant, or in the alternative for a nonsuit, upon the grounds that there was no evidence, or no sufficient evidence, in support of the plaintiff's case, and that if the evidence disclosed any negligence on the part of Davidson which caused or contributed to the death of Niwhai Kohu, then the evidence also conclusively proved such contributory negligence on the latter's part as would bar the plaintiffs from recovering. Alternatively it moved that the verdict of the jury and the judgment thereon be set aside,

and that a new trial be ordered on the grounds: (i) That the jury had been misdirected as to what constituted contributory negligence on the part of Niwhai; (ii) that the damages awarded to the plaintiffs by the jury were excessive; and (iii) that the verdict of the jury was against the evidence or the weight of the evidence.

The misdirection of the learned trial Judge, on which the appellants relied in support of their motion for a new trial, is set out in the judgment of *Myers*, C.J.(1).

10 The motion was argued before *Fair*, J., who dismissed the motion and entered judgment in accordance with the jury's verdict.

From this judgment or order the plaintiff appealed upon the ground that it was erroneous in fact and law.

15 *Meredith* and *Bollard*, for the appellant.
Cooney, for the respondent.

Cur. adv. vult.

In the Court of Appeal.

MYERS, C.J. The main allegations of negligence made by the respondents were that Davidson, the driver of the appellant's motor-truck, (a) drove his motor-truck on his wrong side of the road immediately prior to and at the time of the collision between the truck and the bicycle ridden by the deceased Maori boy; (b) drove at an excessive and dangerous rate of speed in the circumstance that he was approaching the entrance to a side road; and (c) failed to keep a proper look out for traffic on the road.

The case for the respondents depended in the main upon the evidence of the witness, Bennett. Mr. *Meredith* challenges that evidence chiefly upon the ground that Bennett's opportunity of observation was so limited as that his evidence as to the appellant's speed and position on the road should not be accepted. That matter was for the jury—it is not for this Court—and I cannot doubt that there was evidence upon which, if they chose to accept it, it was competent for the jury to find that the truck-driver had been negligent in the respects alleged, and that he approached what he knew to be a dangerous corner at a speed of forty miles an hour. And if the evidence were accepted, then *prima facie* on the case for the respondents the circumstances were such as to enable the inference to be drawn that the truck-driver's negligence was the cause of the accident. There was certainly, in my opinion, at the conclusion of the plaintiff's case a case to go to the jury. The truck-driver, however, then gave evidence

(1) *Post*, p. 126, l. 32.

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to the effect that the deceased boy rode on the wrong side of the road immediately prior to and at the time of the collision, cut the corner in turning from the Judea Road into the main road, and failed to give way to the truck approaching from his right. In these circumstances the question as to whether the deceased boy was negligent, and, if so, assuming that the jury found the truck-driver also negligent, the question whose negligence was the cause of the accident, were matters for the jury to determine, and in such determination the question as to whereabouts in the road the accident happened was one of much importance. The jury were entitled to reject the evidence of the truck-driver, and, if they did, the *prima facie* case made on behalf of the respondents remained unanswered. In fact the jury found a verdict in favour of the respondents, awarding £580 damages. Assuming that the jury were properly and correctly directed, I do not myself think that the verdict could be disturbed unless this Court proceeds to re-try the case and usurp the function of the jury which was the properly constituted tribunal. If that is right, then the application for a nonsuit, or alternatively judgment for the defendant notwithstanding the verdict, necessarily fails.

But in the further alternative a new trial is sought. One of the grounds alleged in the motion-paper is that the damages awarded by the jury are excessive, but that ground was abandoned by Mr. *Meredith*. A second ground is that the verdict is against the evidence or against the weight of evidence. In my opinion, however, the motion cannot succeed upon that ground: I think there was evidence sufficient to prevent its being held that the verdict was so unreasonable as that it could not properly be found.

There is, however, a third ground—namely, that of misdirection of the jury. The learned Judge in his summing-up, when dealing with the question of the alleged negligence on the part of the deceased boy and after quoting a certain traffic regulation to which I shall refer directly, directed the jury thus: "If you decide that the facts show that he [*i.e.*, the deceased boy] should have seen the truck and known of the possibility of an accident, that establishes *prima facie* negligence, and you will accept it as such in the absence of rebutting considerations. There is one matter in this connection for you to consider: the kind of care required from persons of his years is that ordinarily exercised by boys of that age. You may think that a boy between the ages of sixteen and seventeen, as this boy was, is not in the same position to know the motor regulations and the necessity for observing them as a man of experience, nor should he be expected to do so with the same degree of care.

"On the other hand, you may think that this boy should have exercised the same degree of care as a man."

At the conclusion of the summing-up, exception was apparently taken by Mr. *Meredith* to that portion of the direction which I have just quoted, and the learned Judge then said to the jury :
 "Mr. *Meredith* asks me to add that the regulations bind this boy of sixteen as well as any one else on the road, and a breach of the regulations, if you are satisfied that he was on the right side of Judea Road going out, or that he failed to give way to the truck on his right when approaching the intersection, is *prima facie* evidence of negligence, to take it out of which category there have to be other factors. The age of the boy is one such factor, and you should consider whether in the whole of the circumstances, including his age, the breach of the regulations, if proved, did amount to negligence."

The regulations relating to bicycles form part of the Traffic Regulations, 1936, and are presumably made under the authority of s. 10 of the Motor-vehicles Amendment Act, 1936, which empowers the making of regulations for the control of any form of traffic other than motor traffic in so far as, in the opinion of the Governor-General, the control of that other traffic is necessary for the proper regulation of motor traffic. Regulation 22, cl. 2, requires that every rider shall keep the bicycle as close as is practicable to his left of the roadway. Clause 5 requires every rider intending to turn at an intersection from any roadway into a roadway to his right, when approaching and turning, to maintain his position to his left of the centre-line of the roadway out of which he is turning until he enters the intersection and then to turn into the roadway into which he is entering as directly and quickly as he can with safety. Clause 6, so far as is material to the present case, is as follows :—

Every rider when approaching or crossing any intersection . . . to or over which any other vehicle . . . is approaching or crossing so that if both continued on their courses there would be a possibility of a collision, shall, if such vehicle . . . is approaching from his right . . . give way to such other vehicle, and allow the same to pass before him, and, if necessary for that purpose, stop his vehicle.

Every person who commits a breach of the regulation is liable under Reg. 5, cl. 3, to a fine of £50.

The negligence alleged by the appellant against the deceased boy consisted of various breaches of the traffic regulations relating to bicycles, and if those breaches were made out it is difficult to see *prima facie* how they could be anything else than cogent evidence of negligence. The question now involved, however,

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is simply whether as a matter of law the deceased boy was entitled to be excused by the jury from the consequences of his negligence on the ground that the law does not require the same degree of care to be exercised by a normal youth of sixteen or seventeen years of age when riding a bicycle as by an adult person ; or rather whether, as a matter of law, his age could be taken into consideration as a factor excusing his negligence if such negligence were proved to the satisfaction of the jury. There has never yet been a decision to that effect, and, if it were the law, it would be exceedingly unfortunate and would constitute an added terror to the difficulties and dangers of modern traffic conditions. Regulation 22 of the Traffic Regulations, 1936, creates penal offences, and under our law every person of or over the age of fourteen years is in substantially the same position so far as responsibility to the criminal law is concerned : Crimes Act, 1908, s. 42. Moreover, a person of the age of fifteen years is entitled, subject to satisfactory evidence of his qualifications, to a motor-driver's license : Motor-vehicles Act, 1924, s. 21. It would be idle to contend, therefore, that a motor-driver of sixteen or seventeen years was entitled on account of his youth to be excused from the consequences of his negligence as such driver. Now, seeing that Reg. 22 applies to "every rider" of a bicycle and that bicycles are used and ridden by thousands of young persons, I can see no reason in principle why any lower standard of care should be permitted in the case of a normal person of sixteen or seventeen years old than in the case of a person of or over the age of twenty-one years, or why the age of the younger person should be a factor in deciding whether or not he has committed a breach of the regulations and has thereby been guilty of negligence. The learned Judge in his judgment on the motion for a new trial referring to the direction which has been challenged by the appellant, says : "That this direction was correct seems to be established by the decisions of two Full Courts in New South Wales in *Watson v. Anderson and Co.*, (1908) 8 N.S.W.S.R. 100, and in *Hunt v. Brassware Ltd.*, (1926) 26 N.S.W.S.R. 449." Those decisions, however, and various other decisions to the like effect in the United Kingdom and elsewhere are master-and-servant cases to which special considerations may apply. Those decisions, to my mind, have no application here, and the same may be said of the many decisions in the books upon the question of contributory negligence in the case of very young children who sustain what may be called school or street accidents. There might well be a question of some difficulty in the case of a very

young child who sustains an injury by accident while riding a bicycle or tricycle, but that question can be left open for determination when it arises. However that may be, I do not think that the direction given in the present case can be upheld,

5 and, in my opinion, such direction was wrong.

Mr. Cooney has contended that, assuming misdirection, a new trial should not be ordered in view of R. 277 of the Code of Civil Procedure. He contends that no substantial wrong or miscarriage of justice has been occasioned in the trial of the action by reason
10 of the misdirection, and urges that there is a presumption against a breach of the law, and therefore it must be presumed that the deceased boy did not commit any breach of the Traffic Regulations. He says on that assumption that there was evidence to go to the jury sufficient to enable the jury to find negligence on
15 the part of the defendant and to find further that that negligence was the cause of the accident. But the fact is that the truck-driver gives evidence from which if accepted it would follow that the deceased boy was guilty of breaches of the Traffic Regulations. It may well be that the jury accepted Davidson's evidence, but
20 nevertheless, on the learned Judge's direction, excused the deceased boy from the consequences of his negligence because of his being only sixteen or seventeen years old. If that was the process whereby the jury arrived at their verdict for the plaintiffs, as it may well have been, then there would have been a miscarriage
25 of justice. That being so, if I am right in my view that there was misdirection, a new trial cannot be avoided.

OSTLER, J. [After reviewing the evidence, and concluding that the respondents should have been nonsuited:] In my opinion, the appeal should be allowed with the usual costs, and
30 judgment should be entered for the appellant Board in the Court below with costs.

As the other members of the Court do not agree with the conclusion to which I have come in this case it becomes necessary to consider the question as to whether there was
35 a misdirection. On this point I have had the advantage of reading the judgment of the other members of the Court, and agree that it was a misdirection in law to direct the jury that they might take into consideration the age of this seventeen-year-old boy for the purpose of deciding that he was not guilty of contributory
40 negligence. In my opinion, that direction was wrong in law; it may have accounted for the verdict of the jury; and I agree, therefore, that the appellant Board is entitled to a new trial.

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SMITH, J. I have carefully considered the evidence in this case and the arguments adduced by counsel, and I am of opinion that there was evidence on which a jury could reasonably hold (i) that the appellant's driver was negligent in being on the wrong side of his road when the collision occurred and for some considerable distance before the collision, and in travelling during the relevant period of time at an excessive speed; (ii) that if the cyclist, aged seventeen, bore the responsibility of the reasonable man for managing his bicycle, he was negligent in his manner of emerging from the side road both as to his place on the road and as to his speed; and (iii) that if the cyclist had the responsibility of the reasonable man, the jury might find that the real or operative cause of the collision was the negligence of either or both: see *Lord Atkin's* speech in *Caswell v. Powell, &c., Collieries*(1).

The jury found for the respondents, and therefore held that the negligence of the appellant's driver was the real or operative cause of the collision.

The learned trial Judge's direction to the jury as to the nature of the responsibility of the cyclist was material. The evidence shows that the cyclist was seventeen years of age and was big and powerful for his age. He had been to school when he was young. He did not drink or smoke. His average earnings were stated to be £2 per week. He used a bicycle which his mother speaks of as "his." His duty under the Traffic Regulations, 1936 (Reg. 22 (6)), at this intersection, was to give way to the motor-car which was approaching from his right. The learned Judge gave the following direction to the jury as to the cyclist's responsibility: "If you decide that the facts show that he should have seen the truck and known of the possibility of an accident, that establishes *prima facie* negligence, and you will accept it as such in the absence of rebutting considerations. There is one matter in this connection for you to consider. The kind of care required from persons of his years is that ordinarily exercised by boys of that age. You may think that a boy between the ages of sixteen and seventeen, as this boy was, is not in the same position to know the motor regulations and the necessity for observing them as a man of experience, nor should he be expected to do so with the same degree of care. On the other hand, you may think that this boy should have exercised the same degree of care as a man. You have to decide whether he should have stopped, and whether there was negligence on

- "his part substantially contributing to the accident. If you so
 "find, you will bring in a verdict for the defendant because if the
 "accident was due to the joint negligence of both parties the
 "plaintiffs cannot recover. At the close of the summing up,
 5 Mr. *Meredith* asked that the jury should be directed that the boy
 was bound by the regulations just as much as any one else on the
 road, and the learned Judge then said: "Mr. *Meredith* asks me
 "to add that the regulations bind this boy of sixteen as well as
 "any one else on the road, and a breach of the regulations, if you
 10 "are satisfied that he was on the right side of Judea Road going
 "out, or that he failed to give way to the truck on his right when
 "approaching the intersection, is *prima facie* evidence of
 "negligence, to take it out of which category there have to
 "be other factors. The age of the boy is one such factor, and
 15 "you should consider whether in the whole of the circumstances,
 "including his age, the breach of the regulations, if proved, did
 "amount to negligence."

- The evidence is that the youth was seventeen years of age
 when he was killed. The defendants' claim is that as a bicyclist
 20 he broke the statutory regulation binding upon him. In applying
 the regulation it is relevant to consider whether the breach was
 the outcome of negligence and not the result of inevitable mistake,
 accident, necessity, or other justifying circumstance: *Canning v.*
The King(2). A justifying circumstance suggested was that this
 25 normal youth was only seventeen years of age. The direction
 to the jury included a statement to the effect that the jury might
 think that such a youth had not the same responsibility as the
 reasonably prudent man, but that they might think he was not
 in the same position to know the motor regulations and the
 30 necessity for observing them as the ordinarily reasonable man
 and that he was not to be expected to observe them with the same
 degree of care. If this is correct in its application to such a youth,
 then, with all respect, I think it dangerous doctrine. Yet if a
 line is to be drawn in law it must be drawn, I think, at
 35 some specific age. After the age of fourteen a child is criminally
 responsible for his acts, and in a criminal Court he cannot plead
 his age as an excuse against conviction. In New Zealand, the
 nature of negligence in the driving of a motor-vehicle is the same
 in both civil and criminal cases: *The King v. Storey*(3). The
 40 same rule must apply to the conduct of a bicycle under the Traffic
 Regulations, 1936. In a criminal case, then, a normal youth of

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(2) [1924] N.Z.L.R. 118; [1923] (3) [1931] N.Z.L.R. 417; G.L.R. 105.
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seventeen would not have been entitled to the direction which was given in his favour in the present civil action on the ground of his age. I am therefore of opinion that it is an error in law to say that the same care in the conduct of a bicycle under the Traffic Regulations as would be required of the ordinary reasonable man might not, by reason of his age, be required of a normal boy over the age of fourteen.

No case which has been cited is, I think, helpful as an authority on the present point. The conclusion which I have reached is consistent with the fact that a person not under the age of fifteen years may, after examination, obtain a license to drive a motor-vehicle. The age of such a person would not exempt him from any of the responsibility of the ordinary reasonable man in the management of his motor-vehicle. I desire to guard myself as to the position of normal children of fourteen years or under. Such children may, of course, be guilty of contributory negligence in collision cases, but their age as well as other factors may be taken into account in estimating the degree of care required from them.

The misdirection was material, and might have influenced the jury in concluding that the cyclist was either not negligent or that his negligence was not part of the operative cause of the collision. I think, therefore, that there must be a new trial.

JOHNSTON, J. For the reasons given in the judgment of the learned Chief Justice which I have had the opportunity of reading, I agree that a new trial must be ordered.

New trial ordered.

Solicitors for the appellant: *Meredith, Meredith, and Kerr* (Auckland).

Solicitors for the respondents: *Cooney and Jamieson* (Tauranga).

[IN THE SUPREME COURT AND IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *Ex relatione*

NORTH AUCKLAND

ELECTRIC-POWER BOARD - APPELLANT

PLAINTIFF

AND

WILSON'S (N.Z.) PORTLAND

CEMENT, LIMITED - - RESPONDENT

DEFENDANT.

S.C.

AUCKLAND.

1938.

Oct. 5, 6, 7,

10;

Nov. 23;

Dec. 16.

FAIR, J.

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WELLINGTON

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June 23, 26,

27, 28;

July 29.

MYERS, C.J.

BLAIR, J.

JOHNSTON, J.

NORTH-

CROFT, J.

Public Works—License to use Water for Generating Electricity—License for Electric Lines—Whether Holder of both Licenses limited to Transmission of Hydro-generated Electricity—Attorney-General's Fiat—Declaration and Injunction sought by Attorney-General on relation of Power Board in respect of alleged unlawful and unauthorized Transmission and Distribution of Steam-generated Electricity—Principles relating thereto discussed—Public Works Amendment Act, 1908, s. 5—Public Works Amendment Act, 1911, s. 2—Public Works Act, 1928, s. 319.

The license to construct and use an electric line contemplated pursuant to the powers given the Governor in Council by s. 2 of the Public Works Amendment Act, 1911, or s. 319 of the Public Works Act, 1928, is not limited to the transmission of electricity generated in any particular way.

The nature of the generating-power is immaterial for the purpose of the said sections.

The respondent company was granted two licenses, contained in one Order in Council, in 1913, (i) to use the water of a river to generate electricity for transmission and distribution within a named area of supply pursuant to s. 5 of the Public Works Amendment Act, 1908; and (ii) to erect and maintain electric lines for lighting and power purposes pursuant to s. 2 of the Public Works Amendment Act, 1911. It generated on its own premises, by steam-power, electricity, which during portions of the year, when the supply of water from the river was irregular, it transmitted over the electric lines for which it held the said license and distributed in the named area.

In an action by the Attorney-General on the relation of an Electric-power Board (hereinafter called the relator) within whose district lay the said area in which the respondent was operating, Fair, J., granted an injunction restraining the respondent "in the circumstances shown "to exist at the date of the hearing of this action" from transmitting and distributing over its electric lines electricity generated by a steam-driven plant, the use of which lines for the purpose of such distribution and transmission in such circumstances he declared to be unlawful.

On appeal and cross-appeal,

Held, per totam Curiam, 1. That, as agreed by counsel, the judgment as formulated could not be supported, as it did not render plain what it permitted and what it prohibited.

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Low v. Innes(1); *Cother v. Midland Railway Co.*(2); *Attorney-General v. Staffordshire County Council*(3); and *Ellerman's Lines, Ltd. v. Read*(4), applied.

2. That no license was required for the generation of electricity by steam-power, and that there had been no breach of s. 319 of the Public Works Act, 1928.

3. That the appellant was entitled neither to the declaration that the transmission and distribution of electricity was unlawful and in excess of the authorities granted by the license, nor to an injunction restraining such transmission and distribution,

On the following further grounds respectively:—

Per *Myers, C.J.*, and *Blair, J.*, That the transmission and distribution of steam-generated electricity was not in excess of the authorities granted by the license; and that the power to transmit steam-generated electricity over the lines was impliedly permitted by the license.

Semble, per *Myers, C.J.*, and *Blair and Northcroft, JJ.*, That, so far as breach of the license was concerned, the license itself afforded an adequate and effective remedy; and the case was one of contract between the Crown and the respondent, so that the remedies depended upon the terms of the contract. The Governor-General was the sole judge as to compliance with the requirements of the license, and his decision was final.

Semble, per *Northcroft, J.*, That what was alleged to be in breach of the license had been done over a long period with the full knowledge of and without objection from the Crown, the license and circumstances which would make the Court reluctant to grant an injunction.

Per *Johnston, J.*, 1. That on the facts there was no positive interest susceptible of enjoyment by His Majesty's subjects as of common right to be protected by injunction.

2. That the relator had no right to ask for an interpretation or to claim any relief in respect of terms of the contract made between the Crown and the respondent company, nor the Court any right to interfere by way of an injunction with the discretion Parliament had given the Governor in Council in determining the conditions and terms of licenses it had authorized.

3. That the Court should not determine questions dependent on the construction of the contract unless the Crown was actively represented, which was not the case where the Attorney-General acted on the relation of a private individual and claimed to maintain a neutral attitude.

4. That there was in the license no indication that a limitation on the transmission and distribution of steam-generated electricity was intended.

Cooper v. Whittingham(5); *Ramsay v. Aberfoyle Manufacturing Co. (Australia) Proprietary, Ltd.*(6); and *Attorney-General and Lumley v. T. S. Gill and Son Proprietary, Ltd.*(7), applied.

Attorney-General v. Sharp(8); *Attorney-General v. Premier Line, Ltd.*(9); and *Attorney-General v. North-eastern Railway Co.*(10), distinguished.

(1) (1864) 4 DeG. J. & S. 286; 46 E.R. 929. (6) (1935) 54 C.L.R. 230.

(2) (1848) 2 Ph. 469; 41 E.R. 1025. (7) [1927] V.L.R. 22.

(3) [1905] 1 Ch. 336. (8) [1931] 1 Ch. 121.

(4) [1928] 2 K.B. 144. (9) [1932] 1 Ch. 303.

(5) (1880) 15 Ch.D. 501. (10) [1915] 1 Ch. 905.

- ACTION claiming (a) a declaration that the transmission and distribution of electricity by the defendant company produced and generated by steam-driven machinery is unlawful and in excess of the authorities granted by the said license; and also
- 5 (b) an injunction restraining the defendant company, its servants and agents, or any or either of them, from transmitting and/or distributing over, along, or through any electric line erected by the defendant company or its predecessor in title the Dominion Company and now used or maintained by the defendant company,
- 10 whether such electric line may have been erected, or is used or maintained, in pursuance or purported pursuance of the said license or otherwise, any electricity or electrical energy or electric current produced or generated by the said steam-driven plant save only such electricity or electrical energy or electric current so produced
- 15 or generated as may be required to be used or consumed by the defendant company at its Portland Works and transmitted and/or distributed over, along, or through electric lines erected, used, or maintained on its own property solely for the purposes of such use or consumption.
- 20 It was common ground between the parties that the North Auckland Electric-power Board (hereinafter called "the Board"), a body corporate duly constituted under the provisions of the Electric-power Boards Act, 1925, and the defendant was an incorporated company carrying on business as a manufacturer
- 25 and distributor of cement and had a cement-manufacturing works at Portland in the North Auckland District. By Order in Council bearing date July 1, 1913, the Governor-General in Council granted to the Dominion Portland Cement Co., Ltd. (hereinafter called "the Dominion Company"), a license, subject to the terms and
- 30 conditions thereof, to take, divert, and use from a stream known as the Wairua River as much water as was available in the said stream (in the said license referred to as "the said water") as might at any time during the term of the said license be required by the Dominion Company for the purpose of generating
- 35 electricity for transmission and distribution within the "area of supply" defined in the said license, and also to erect and maintain electric lines for lighting and power purposes as in the said license described.

- In its statement of claim, the plaintiff said that, by virtue of
- 40 its incorporation and constitution under the Electric-power Boards Act, 1925, and its amendments, the Board was the Electric-power Board of (a) the North Auckland Electric-power District, which comprised the constituent districts of the Counties of Whangarei,

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Otamatea, and Hobson, the Borough of Dargaville, and the Town District of Hikurangi; and (b) an "outer area" within the meaning of the said Act comprising that area lying within the boundaries of the Borough of Whangarei; and the aforesaid Electric-power District and outer area included the area of supply of the defendant company already described. By Orders in Council bearing date December 2, 1930, the Board was duly authorized in pursuance of the Electric-power Boards Act, 1925, and of the Public Works Act, 1928, to construct electric works, and to construct and use electric lines for the purpose of the sale, distribution, and supply of electricity within the North Auckland Electric-power District, and in pursuance and exercise of such authority the Board constructed electric works and electric lines within the said district. 5 10

The plaintiff alleged that, in terms of the said license, the authority of the defendant company to transmit and distribute electricity over, along, and through electric lines is restricted to electricity produced and generated by means of the hydro-electric power-station referred to and transmitted and distributed over, along, and through electric lines erected, used, and maintained pursuant to the said license; and that the defendant company, however, had operated and was operating at or about its works at Portland aforesaid certain steam-driven plant or machinery and by the use thereof produced and generated electricity; and the defendant company unlawfully and in excess of the authorities granted by the said license had transmitted and distributed beyond the limits of its own property and continued so to transmit and distribute over, along, and through the electric lines erected, used, and maintained pursuant to the said license electricity produced and generated by means of certain steam-driven plant or machinery. 20 25 30

The defendant Board admitted that it had operated at or about its works at Portland certain steam-driven plant or machinery, and by the use thereof produced and generated electricity. It further admitted that for a period of time, amounting in all to not more than an average of forty hours per year, it had transmitted and distributed electricity produced and generated by means of the said steam-driven plant or machinery to the Whangarei Borough Council pursuant to the contract already referred to, but that the occasions of such transmission and distribution as aforesaid were occasions of emergency solely and were necessary to enable compliance with the obligations under the conditions of the contract with the said Whangarei Borough Council. 35 40

By the First Schedule to the said license the area of supply therein referred to was expressed to be—

- That part of the Auckland Provincial District bounded on the north by an imaginary line between the Whangaruru Post-office and the Maunganui Bluff, and on the south by an imaginary line between the Mangamai Post-office and the Matakoho Post-office, extended in a direct line in both cases to the sea, and on the east and west by the coast-line, including Matakoho Island; as shown on the plan marked P.W.D. 33476, deposited in the office of the Minister of Public Works at Wellington.

- By Order in Council dated September 29, 1930, the said license was amended by substituting for the area of supply prescribed by the said First Schedule thereto the following area, viz. :—

- That part of the Auckland Provincial District bounded on the north by an imaginary line drawn from the Wairua Power-station to Wairua Falls, thence to Poroti Post-office, thence to Tapu Point; and bounded on the south by an imaginary line drawn from Wairua Power-station to Whangarei Harbour at Portland; also the route of the 22,000-volt line from Portland to Whangarei Borough substation; all as shown bordered red on P.W.D. plan numbered 79582, deposited in the office of the Minister of Public Works at Wellington.

- With the consent of the Governor-General in Council and expressed by Order in Council bearing date July 8, 1919, the said license and the benefits and obligations thereunder were assigned to, and the said license was being held by, the defendant company.

- In pursuance of the said license the defendant company or its predecessor in title the Dominion Company constructed, used, and operated certain works including a hydro-electric power-station in or adjacent to the said Wairua River, and erected, used, and operated electric lines for the supply, transmission, and distribution within the area of supply from time to time defined by virtue of the said license of electricity generated at the said hydro-electric power-station, and the said works, hydro-electric power-station, and electric lines were used and operated by the defendant company.

- By the said license and subject to the terms and conditions thereof the Dominion Company was authorized to supply electricity to the Whangarei Borough Council upon the terms and subject to the conditions set forth in an agreement dated March 31, 1913, a copy of which was set out in the Second Schedule to the said license, and in pursuance of such authority the Dominion Company and thereafter the defendant company supplied, and the defendant company still supplied, electricity to the said Borough Council.

North and Astley, for the plaintiff.

Rogerson and Terry, for the defendant.

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FAIR, J. This is an application to the Court to declare that the transmission by the defendant company of electricity generated by steam-power along the electric lines owned by it between its works at Portland and the Borough of Whangarei and the district of Maungatapere is unlawful, and for the issue of an injunction against it continuing to transmit electricity so generated along such lines. 5

On July 1, 1913, the Governor in Council granted a license under s. 5 of the Public Works Amendment Act, 1908, and s. 2 of the Public Works Amendment Act, 1911, to take and use water from the Wairua River in the North Auckland District for the purpose of generating electricity for electric light, mechanical power, or other uses, and to erect and maintain electric lines for lighting and power purposes upon the terms and conditions set out in the license. An area of supply was defined which included the District of Maungatapere and the Borough of Whangarei. Clause 6 of the license provides, *inter alia*, 10 15

The licensee shall install, construct, maintain, and use the following works for the purposes of this license :— . . .

(d) Such transmission and other lines, together with such transforming and converting apparatus as may be required to serve the purpose of this license. 20

The terms and conditions contain full details as to a submission of drawings, plans, and specifications to the Minister of Public Works, and other provisions usual in such licenses. Clause 18 imposed an obligation on the licensee to supply electrical energy to the Whangarei Borough Council upon the terms and conditions set forth in the draft agreement between the licensee and a Committee of the Borough Council, if the Council should so require. The licensee also undertook to supply the Dargaville Borough Council and the Whangarei County Council to an aggregate of 250-horse power at a price not exceeding £9 per annum if required to do so. It also made provision for the supply of any surplus power to other persons at a price not exceeding a fixed maximum. The conditions to be complied with with regard to the construction of the electric lines, the current to be transmitted, conveyance to consumers' premises, maintenance, and route were prescribed in detail. 25 30 35

Clause 43 provided :

From and after the time when the licensee commences to supply energy in pursuance of this license, it shall maintain continuously sufficient power for the use of all consumers for the time being entitled to be supplied : provided also that, for any purpose connected with the efficient working of the undertaking, the Minister may give permission to the licensee to discontinue the supply at such intervals of time and for such periods as he, the Minister, may think expedient. 40 45

Clause 49 provides :

(c) If the licensee fails or neglects to use and maintain the said works after completion thereof, so as to secure to the area of supply the full benefit of the undertaking; or

5 (d) If the licensee fails to perform, observe, fulfil, or keep any of the requirements, conditions, and provisions of the Public Works Act, 1908, or its amendments, to the full extent of the same, or of any part thereof; or

(e) If the licensee shall fail to observe any of the conditions or obligations herein imposed upon the licensee,

10 then in any such case it shall be lawful for the Governor, by Order in Council, either to revoke this license or to impose upon the licensee a fine not exceeding £100 for every week or part of a week for such default, such fine to be recovered in any Court of competent jurisdiction by any person appointed by the Governor to recover the same.

Clause 50 provided that such powers should not be exercised
15 in case of a breach which, in the opinion of the Governor, could be met by a fine until thirty days after the giving of notice, and for any breach which, in the opinion of the Governor, was of such a nature as to require the revocation of this license, after ninety days' notice and default in remedying the same within such time.

20 Clause 51 provided :

The Governor shall be the sole judge of the fact whether the requirements of this license have been complied with . . . and his decision shall be final. . . .

Clause 53 provided :

25 This license shall be deemed to constitute a contract as between the licensee and His Majesty the King, and may be enforced as a contract by and against His said Majesty or the licensee accordingly.

The licensee commenced to generate electricity from the Wairua River on September 27, 1916, with a plant of a capacity
30 of 2,000 kilowatts. The electricity was used at the licensee's works at Portland, and to supply the Borough of Whangarei and a body of consumers in the Maungatapere District. On November 17, 1920, the licensee installed a steam plant of 580-kilowatts capacity at its works at Portland. In November, 1924, the use
35 of this plant was discontinued and a steam plant of 1,500-kilowatts capacity was installed. On November 1, 1928, an additional steam plant of 1,595-kilowatts capacity was installed at Portland.

The defendant company duly acquired the rights contained in such license.

40 The evidence called showed that the electricity generated from the hydro plant and that generated from the steam plant ran along the electric transmission-lines "in parallel." That was explained as meaning that the electricity from both sources was running along the same lines when both generating plants were
45 working. At times the hydro plant was closed down owing to the necessity for cleaning the canal that led to it, to transmission faults, and to the necessity, at one time, of replacing the insulators

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on the transmission-lines. On such occasions, which amounted to some-965 hours over a period of eleven years, the whole of the power required by the Whangarei Borough and the consumers at Maungatapere was supplied from the steam plant at Portland. At times, too, the supplies were used "in interchange" as a matter of convenience. The evidence further showed the power from the steam plant was, in the year 1931, used to supplement the hydro-power as the water in the Wairua River was insufficient to provide the whole of the power required by Whangarei. It showed, too, that the river sometimes fell to such low levels that in a dry season the water-power might require supplementing to meet such requirements. It was further proved that the transmission of the power "in parallel" was more convenient to the company for technical reasons, and that it did not desire to sectionalize it—i.e., to keep the electricity generated from the two sources separated.

There was no additional danger to the public from the transmission of the electricity from the steam plant along the transmission-lines.

The plaintiff claims that the transmission of power generated at Portland along the electric lines is not authorized by the license held by the company; that, consequently, such transmission is a use of the electric lines not authorized by the license, is in breach of the provisions of s. 319 of the Public Works Act, 1928, and should be so declared and an injunction issued prohibiting the continuance of its transmission.

Section 319, so far as it is relevant, reads as follows:—

(1) No person shall lay, construct, put up, place, or use any electric line except under the authority of a license issued to him by the Governor-General in Council under this section. Every person who commits a breach of this provision is liable to a fine not exceeding one hundred pounds.

(2) The Governor-General may from time to time by Order in Council, gazetted make regulations—

(a) Prescribing the form of licenses under this section, the conditions on which any such license may be issued, and the fees payable thereon:

(b) Controlling the use and management of any works or lines used for generating, transforming, converting, or conveying electricity (whether so used pursuant to a license under this section or not) so as to secure the safety of the consumers or employees and of the public from personal injury by reason of such use:

(c) Providing for the removal of lines laid or erected in breach of this section, and of any line in the use of which any of the conditions of the license under which it was laid or erected are not observed or complied with, and for the removal or alteration of any dangerous line (whether erected under the authority of a license issued under this Act or any other Act or not), at the expense in each case of the owner of the line:

(d) Imposing fines not exceeding twenty pounds for the breach of any such regulation.

The defendant contended :

1. That the Attorney-General was not entitled to bring this action as the matters in issue concerned only a section of the public.

5 During the argument I intimated that I thought that this contention could not be sustained, and I do not propose to recapitulate my reasons.

2. That there is no sufficient ground for the intervention of the Court, and that it should decline to make the declaration asked
10 for, or to grant an injunction as the matter is one which the license contemplates should be dealt with under cl. 51, if necessary, by the Governor ; and, moreover, there is a remedy for any breach by information under s. 319 ; and that the assistance of this Court should not be given unless that remedy
15 has proved ineffectual.

It may, perhaps, be doubtful whether cl. 51 covers such a position as that complained of here. But even if the facts authorized action under cls. 49 and 50 and cl. 51 applied, that would not deprive the Court of jurisdiction to grant an injunction
20 where it is an appropriate remedy : *Attorney-General v. Sharp*(1) and *Attorney-General v. Premier Line, Ltd.*(2).

3. That the breach complained of has continued to the knowledge of the officers of the Public Works Department for, at least, more than two years ; that it is not a substantial
25 or serious one, but at most a technical one ; and that the Court should not exercise its power to grant an equitable remedy by way of declaration or injunction.

Mr. North submitted that, as the suit had been instituted by the Attorney-General, the Court has no discretion as to granting
30 or withholding the relief asked for, but upon proof of a breach of s. 319 of the Public Works Act is bound, if not to give an injunction, at least, to make the declaration asked for.

It is necessary before considering the position to consider this contention. The judgment of *Pollock, M.R.*, in *Attorney-General*
35 *v. Westminster Corporation*(3) was chiefly relied on in support of it. That was an action to restrain the defendant Corporation from using, wholly for the general purposes of the Council, buildings which had been erected as libraries. The Master of the Rolls said : " Having regard to the position which the Attorney-
40 " General occupies before this Court, it does not seem to me to " be possible to be questioned, as a matter of discretion, whether

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(1) [1931] 1 Ch. 121.

(2) [1932] 1 Ch. 303.

(3) [1924] 2 Ch. 416.

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"or not he is entitled to the redress which he asks in the public
"interest, in reference to a matter upon which a public authority
"has exceeded its powers. The Attorney-General has been
"satisfied that this is a case in which his duty requires him to take
"steps to see that that excess or attempted excess of public powers 5
"shall be brought to an end. Having regard to that, as we are
"of opinion that the powers of the statute have been exceeded,
"I think the Attorney-General has established his right to
"relief"(4).

If the present case were identical in substance with that case, 10
then this passage would be of great force in support of the
plaintiff's contention were it in harmony with the other
authorities. But it appears that the Master of the Rolls alone
held this view and the three other Judges who considered the
case were of the contrary opinion. *Tomlin, J.*, at the original 15
hearing(5) said with reference to this matter: "It is contended
"that the Court has a discretion as to the granting of an
"injunction, even in an action in which the Attorney-General
"is plaintiff; and that if it is really for the public benefit that
"that should be done which is proposed to be done, an injunction 20
"should be refused. *I accept the view that the granting of*
"*an injunction is a matter of discretion.* The question in any
"particular case or class of case is what are the circumstances
"which justify the exercise of the discretion in the direction of
"a refusal of the injunction? I do not, however, accept the 25
"view that where the Attorney-General is suing to restrain an
"illegal or unauthorized act on the part of a public body, it is the
"function of the Court, before granting an injunction to
"investigate whether the act complained of, though found to
"be illegal or unauthorized is (measured by some standard, which 30
"counsel at the Bar has not defined) *for the public benefit.* In
"my opinion, the public benefit is best secured by public bodies
"acting within the frontiers of their powers. *There may be cases*
"*where some special circumstance will justify refusal of an*
"*injunction*; but speaking generally, where the Court concludes 35
"that an unauthorized user for a permanent purpose is intended
"to be made of the property of a public authority, I do not think
"that an injunction ought to be refused, even if it were shown
"that advantages would result to the public from what is
"intended to be done"(6). Then in the Court of Appeal(7) 40
Warrington, L.J., says: "If the Attorney-General, acting on

(4) [1924] 2 Ch. 416, 421, 422.

(6) *Ibid.*, 454.

(5) [1924] 1 Ch. 437.

(7) [1924] 2 Ch. 416.

- "behalf of the public body, in the exercise of his discretion as a public officer, comes to the conclusion that he is justified in asking the Court to restrain an illegal act on the part of a public body, I do not think this Court is entitled to refuse the
- 5 "injunction *merely because it is said that there is no evidence of any public wrong being done*. The real result, if that argument were to be acceded to, would be that in such a case there would be no means of preventing that kind of illegal act on the part of the public body in question"(8). It will be seen from this
- 10 passage that the learned Judge is dealing with the general rule applicable to such a case as that before him, and the necessity of issuing an injunction where no other sufficient means of preventing an infraction of the law exists. He is considering the argument that an injunction will not be issued where no substantial harm
- 15 has been done by the local body acting *ultra vires*. *Sargant, L.J.*, says: "Of course the discretion as to the relief to be granted, whether by injunction or otherwise, still rests with the Court"(9). And he thereafter expresses his agreement with the views stated by *Tomlin, J.*
- 20 In my view, the judgments of *Sargant, L.J.*, and *Tomlin, J.*, are opposed to the view expressed by the Master of the Rolls, and are to be preferred to it. The practice in relation to *ex relatione* proceedings is well known. The statement of claim intended to be filed, a concise statement of the facts, the opinion of counsel
- 25 as to the existence of the right to the relief asked, and the necessary undertakings as to costs are supplied to the Attorney-General. It is on these papers, and such other information as he may call for, that he makes his decision as to whether he shall allow his name to be used or not. In general, the defendant is
- 30 not supplied with a copy of the information put before the Attorney-General, or invited by him to comment on it. It is an *ex parte* application which is decided upon a statement of the facts which, however conscientious the applicant may be, must generally be incomplete and, from the weakness of human nature,
- 35 is likely to be to some extent biassed. In such circumstances, the decision of the Attorney-General can generally only be assumed to amount to a decision that, upon the facts presented to him, such action as is proposed is not frivolous, or obviously improper. Having regard to these considerations, it seems to me
- 40 it would be an abdication of the proper functions of the Court to assume in favour of the plaintiff in each case that the breach was such as to require the Court to grant the relief asked for, and to deprive it of its discretion.

(8) *Ibid.*, 424.(9) *Ibid.*, 425.S.C.
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This view is in conformity with a long line of authority commencing with the judgment of Lord Romilly in *Attorney-General v. Ely, Haddenham, and Sutton Railway Co.*(10) (affirmed on other grounds not affecting this aspect(11). These authorities were approved by the Court of Appeal in *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*(12), and acted upon by *Lush, J.*, in *Attorney-General v. Kerr and Ball*(13). 5

Moreover, the Attorney-General in this case has informed the parties that, although after a full consideration of the pleadings and evidence he can see no reason to stay the proceedings, he 10 desires to make it clear that he is entirely neutral, and is not making any assertion or representation involving any question as to what the Court's discretionary powers may be.

I think, therefore, that the passages in *Kerr on Injunctions*, 6th Ed. 30, 18 *Halsbury's Laws of England*, 2nd Ed. 41, 50, and 27 15 *Halsbury's Laws of England*, 191, and 1937 *Yearly Practice*, 915, state the law correctly that the Court has a discretion as to whether it should make a declaration or grant an injunction.

Mr. North admitted that there was a general rule of law that the discretion would not be exercised in favour of an application 20 for an injunction except where there was a substantial ground for the application, but contended that the rule is confined to cases where the Attorney-General took action to restrain a nuisance to the public. He contended that the rule did not apply to actions instituted by the Attorney-General to prevent a breach of a duty 25 imposed by statute in the interests of the public, and submitted that there is an inflexible rule that the Court will grant the application where a clear breach of a statutory prohibition has been committed, and is being deliberately continued.

My attention was directed to many cases in which the public 30 bodies were restrained from so acting. I need only refer to the cases of *London County Council v. Attorney-General*(14); *Dundee Harbour Trustees v. D. and J. Nichol*(15); *Attorney-General v. Frimley and Farnborough District Water Co.*(16); and *Attorney-General v. West Gloucestershire Water Co.*(17). But in these cases 35 the local authorities and statutory bodies concerned were carrying on businesses which they were not authorized to carry on, and which were not incidental to a business which they were authorized to carry on. They were administering the moneys employed in such businesses as quasi-trustees for ratepayers and 40

(10) (1868) L.R. 6 Eq. 106, 111.

(11) (1869) L.R. 4 Ch. 194.

(12) [1910] 1 Ch. 48.

(13) (1914) 79 J.P. 51.

(14) [1902] A.C. 165.

(15) [1915] A.C. 550.

(16) [1908] 1 Ch. 727.

(17) (1909) 78 L.J. Ch. 746.

others. To embark in this way on a new business or undertakings without authority was clearly a substantial and serious extension of their powers. Similar proceedings have been successful against companies undertaking businesses *ultra vires*. In the present case the use of the electric lines for the transmission of steam-generated electricity is not the undertaking of a new business by the defendant company, for it is not alleged that such a supply is a business which the company is not authorized by its memorandum to undertake. It appears, therefore, that these cases do not assist the plaintiff.

But the plaintiff's contention that he is entitled to the declaration and the relief he asks finds strong support in the decision of the Court of Appeal in England in *Attorney-General v. London and North-western Railway Co.*(18) and the cases referred to in that judgment. The cases are distinguishable on the facts, and the breaches in each case were more serious than the breach of the statute complained of here. But the Court clearly held that it was not necessary for the Attorney-General to show damage to the public where a statute was being wilfully and advisedly broken; and that an injunction would usually be granted in such a case. The Court may postpone its issue where that is desirable. *Lord Robson* in *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*(19) agreeing with the decision of the Court of Appeal(20).

Section 319 of the Public Works Act, 1928, was passed to protect the public from danger owing to the use of transmission-lines. It may be that there were other reasons inducing the passing of the legislation, but no such reasons appear on the statute. The acts complained of are not, in the circumstances, likely to lead to the mischief which the statute is directed to avoid. But the language of the existing license shows that it extends to cover only the transmission of hydro-generated power and does not authorize the use of the line for the transmission of steam-generated power. Its transmission is therefore a breach of the provisions of that section. The defendant seeks to continue to disregard the provisions.

Attorney-General v. London and North-western Railway Co.(21) decides that the balance of public convenience is not to weigh in determining the exercise of the discretion. The declaration of the law in the statute is the governing consideration, and when the breach is contrary both to the letter and the spirit

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(18) [1900] 1 Q.B. 78.
(19) [1912] A.C. 788, 812.

(20) [1910] 1 Ch. 48.
(21) [1900] 1 Q.B. 78.

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of the statute and is brought to the notice of the Court by the Attorney-General on behalf of the public, the relief asked for should, I think, ordinarily be granted, although I have no doubt that there is power to refuse the declaration and the injunction where the breach is clearly negligible or trivial, or there are other special circumstances making it just to refuse the injunction. 5

It may be that the Crown, upon being applied to for a license to enable electricity from the steam plant to be transmitted over these lines, could not refuse it on any ground other than that of the danger to the public. This may well depend on regulations which have not been considered in relation to this aspect: see *Jorgensen v. Minister of Customs*(22). 10

Apart from this aspect, as the defendant company has not expressed its intention of discontinuing such transmission, I feel unable to say that the breach of the law is so trivial or the remedy by summary proceedings so adequate and sufficient as to warrant the dismissal of this action on that ground. Nor can I say that there are special circumstances, such as existed in *Attorney-General v. Kerr and Ball*(23), sufficient to justify the Court in refusing to lend its aid to prevent a deliberate continuance of the offence. 15 20

In my view, as I have said, it is clear from the terms of the license that it authorizes the use of the transmission-lines only for the purpose of transmitting hydro-generated power. Section 319 clearly prohibits their use for any other power. It may be, however, that there is implied in the license authority to transmit power generated in other ways where it is in substitution for power which would, but for some breakdown in the plant or other emergency, be available for transmission. That question is a difficult one, and should not, I think, be determined in the absence of the Whangarei Borough Council. Moreover, it involves the question as to whether such a situation would amount to "special circumstances" which should lead the Court to refuse to make a declaration or grant an injunction. That position may never arise, and I think, therefore, that I should refrain from deciding it in these proceedings. 25 30 35

A declaration will therefore be made that, except in special circumstances, the transmission and distribution over the lines in question of electricity generated by a steam-driven plant is unlawful. An injunction will issue to give effect to this declaration. The form of the declaration and injunction will be submitted to the Court before sealing, and, if necessary, counsel will be heard upon it. 40

- It is, perhaps, desirable that I should add that the defendant company has acted reasonably throughout; that no danger to the public was caused by its using the transmission-lines in the way it has; and that such use has proved convenient not merely to itself, but, when the hydro-power was not available, to the Whangarei Borough Council and their consumers. It would appear from the evidence before me that it might well be granted a license to enable the most efficient use to be made of the existing plant.
- 10 But an important principle was in issue, difficult questions of law were argued, and, as the defendant company has not succeeded in its contention, I think I should follow the usual rule and allow costs to the plaintiff. These will be as on a claim for £250, with witnesses' expenses and disbursements to be fixed by
- 15 the Registrar. £10 10s. will be allowed for each of two extra days, and £15 15s. for second counsel, together with £5 5s. costs in respect of the interrogatories and £5 5s. to cover both discovery and inspection.

- Liberty will be reserved to both parties to apply in respect of any further matter that they may think requires consideration.

The formal judgment of the Court was as follows:—

1. That in the circumstances shown to exist at the date of the hearing of this action it is unlawful for the defendant company to use for the purpose of transmitting and distributing electricity generated by a steam-driven plant the electric lines which by the terms of its license dated July 1, 1913, as amended by Order in Council dated September 29, 1930, it was authorized to erect and maintain.

2. That in the circumstances shown to exist at the date of the hearing of this action the defendant company, its servants or agents, or any or either of them, be restrained from transmitting and distributing over, along, and through the said electric lines electricity generated by means of a steam-driven plant and that a writ of injunction shall issue accordingly.

- 35 Then followed the detailed order as to costs.

From the above judgment, both parties appealed.

- The plaintiff appealed from that part of the judgment which limited the declaration therein made and the extent or operation of the injunction thereby granted to the plaintiff by the introduction of the qualification that there may be special circumstances (which are left undefined) justifying the defendant using its electric lines for the purpose of transmitting and distributing electricity generated by means of its steam-driven plant upon the

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Ex rel.
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FAIR, J.

grounds that that part of the judgment was erroneous in point of law and in point of fact.

The defendant cross-appealed from the whole of the judgment upon the grounds that it was erroneous in point of law and in point of fact.

5

In the Court of Appeal,

North and Astley, for the appellant.

Rogerson and Terry, for the respondent.

Rogerson, for the respondent. A. The plaintiff cannot have an injunction, because an effective alternative remedy has been provided: see *Attorney-General v. Sharp*(1). The basis of the Court's jurisdiction to grant an injunction, where there is an alternative remedy, is that no other remedy would be effective. The Crown is aware of the position here, but has taken no action under statute or otherwise; here there is another remedy under the contract between the Crown and the company: see *cls. 49, 51, 53. Section 319 of the Public Works Act, 1928, replaces s. 2 of the Act of 1911 and provides for a fine. It is common ground that regular returns are made by the company to the Public Works Department. See Attorney-General v. Premier Line, Ltd.*(2); *Attorney-General v. Ashborne Recreation Ground Co., Ltd.*(3); *18 Halsbury's Laws of England, 2nd Ed. 51; and Kerr on Injunctions, 6th Ed. 31. Immediately the Attorney-General becomes a party to a proceeding there is no need to prove damage; the interest of the public at large is thereby imported into the matter; and the Attorney-General is entitled to obtain an injunction where a private person would not be entitled, but only where there is no other effective remedy. Where the Attorney-General is not a party, the mere existence of other remedies, whether effective or not, prevent a private person from getting an injunction.*

B. The Court has a discretion as to whether it will grant an injunction, and in the circumstances of this case an injunction should be refused. The statement by the learned trial Judge as to the Court having a discretion(4), is adopted: see *Attorney-General v. Premier Line, Ltd.*(5), and *Attorney-General v. Wimbledon House Estate Co.*(6). As to the Court of Appeal's power to review the exercise of a Judge's discretion in certain

(1) [1931] 1 Ch. 121, 124, 125, 129, 132. (4) *Ante*, p. 141, l. 28-p. 145, l. 10.

(2) [1932] 1 Ch. 303, 313.

(5) [1932] 1 Ch. 303, 313, 314.

(3) [1903] 1 Ch. 101.

(6) [1904] 2 Ch. 34, 42.

cases, see *Evans v. Bartlam*(7). The Court, in exercising its discretion, must do so after consideration of the facts and the whole of the surrounding circumstances: *Kerr on Injunctions*, 6th Ed. 31; 18 *Halsbury's Laws of England*, 2nd Ed. 13; 5 *Attorney-General v. Gee*(8); and *Attorney-General v. Kerr and Ball*(9). In considering the surrounding circumstances, the interests of third parties must be regarded: *Hartlepool Gas and Water Co. v. West Hartlepool Harbour and Railway Co.*(10); and see the judgment in the Court below(11).

- 10 *North*, for the appellant: It is admitted that the injunction in the form set out in the order cannot be enforced.

Rogerson continues. Here, at most, there can be no more than the breach of a bare legal provision. There is no damage. The mischief intended to be avoided has not been committed.

- 15 The relator Board has suffered no loss, but is endeavouring to make a profit. The issue of an injunction would involve the public in Whangarei in inconvenience and loss. There is available an effective alternative remedy, which should be pursued. An injunction would affect the rights of parties not
20 before the Court.

- In any event, the injunction should not be absolute in form, but should enable the defendant company to supply Whangarei, or any other place, with steam-generated power when hydro-generated power is not available through causes beyond the
25 defendant company's control.

- C.* If the argument as to *B* is not accepted, then it should be taken into consideration so that an injunction should be limited in the manner evidently intended by the Court below. Under ss. 318 and 319 of the Public Works Act, 1928, and the
30 terms of the license, there is authority to supply steam-generated power; and, alternatively, there is nothing to prevent the company from supplying it.

- D.* No further license is required, and there has been no breach of s. 319 of the Public Works Act, 1928. It is immaterial that
35 at the time the license was granted the company's predecessors had no steam plant. The question is, What is the legal effect of the license as it now stands? The license was granted under s. 5 of the Public Works Act, 1908, and s. 2 of the Public Works Amendment Act, 1911. There is nothing in the statute or in

(7) [1937] A.C. 473, 486; [1937] (9) (1914) 79 J.P. 51.

2 All E.R. 646, 654.

(8) (1870) L.R. 10 Eq. 131, 137.

(10) (1865) 12 L.T. 366, 368.

(11) *Ante*, p. 146, l. 29.

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the license which prohibits the licensee from using the lines lawfully erected for transmitting steam-generated power. The references in the license relating to hydro-generated power are descriptions or statements of fact: conditions limiting the nature of the respondent's supply or its method of generation. There was a complete license under s. 318 (8) of the Public Works Act, 1928, which is complete in itself without recourse to s. 319 ("such lines " as are required for transmission"). The inclusion of the power in s. 319 gave the respondent authority to construct lines and to use them, and this power is not limited. On the true construction of the license, apart from any expressed intention, the respondent has the right to use the steam-power plant.

North, for the appellant. [After dealing with the facts.] The respondent has granted a license to generate and distribute hydro-power, and its line license is ancillary to the authorized undertaking; it has no right in gross to use its lines. A license under s. 318 of the Public Works Act, 1928, is limited to the licenses that may be granted under that section: a license under s. 319 is necessary for the use of the lines: *cf.* Public Works Amendment Act, 1908, s. 5. At that time, and until the passing of s. 2 of the Amendment Act, 1911, the lines were controlled by the Post and Telegraph Department: so that a license under s. 318 of the principal Act was insufficient for the respondent's purposes, as, in order to use its line, a license under s. 2 of the Public Works Amendment Act, 1911, was necessary: see ss. 320 and 326 thereof. Section 326 (s. 8 of the Public Works Act, 1923) is important. It provides for cancellation and amendment of licenses: see the proviso to subs. 1. When the company obtained its license, it had to make an application, and the system of supply had to be stated: for the regulations, see 1912 *New Zealand Gazette*, 504, 512, and 1925 *New Zealand Gazette*, 2495.

An application is linked up with an approved and authorized source of supply: a right to use the water. There is no half-way house in relation to a stand-by plant. Either by design or accident there is a right to use the lines from any lawful source and to any extent; or there is, as the appellant contends, a right to use them only for the particular hydro-works: either it is a right in gross or merely a license for the particular undertaking. It was open to the Government to restrict the use of the lines to the supply of electricity from a defined source.

[MYERS, C.J. The question is whether they have done it.]

If they have not, then the respondent must have a right in gross; but see s. 319 (2) (b) of the Public Works Act, 1928. The license is restricted to the purposes authorizing the supply of electricity from the generating source: *Marriott v. East Grinstead Gas and Water Co.*(12) and *Attorney-General v. Frimley and Farnborough District Water Co.*(13). The respondent had no power to use steam-generated electricity in cases of emergency. Since the Electric-power Boards were formed, the policy of the Legislature has changed: see s. 27 (4) of the Electric-power Boards Act, 1925. In considering implied powers, regard may not be had to any balance of convenience: *Attorney-General v. Leicester Corporation*(14); *Attorney-General v. Mersey Railway Co.*(15); *Dundee Harbour Trustees v. D. and J. Nicol*(16); and *London County Council v. Attorney-General*(17). If the license gives no right to use the lines for transmission of steam-generated power in an emergency, no such power can be implied. In the case of a private company, the license must be construed strictly: *Craies on Statute Law*, 4th Ed. 250, 251, and *Moser v. Marsden*(18).

As to the Court's discretion in cases at the suit of the Attorney-General, see *Street on Ultra Vires*, 367, 368.

[JOHNSTON, J. This is not a case of *ultra vires*: it is a case of construction.]

Once the construction is determined, the purpose of the license is ascertained, and an excess of powers emerges. The term "*ultra vires*" extends to an excess of powers granted by a license to the extent of the illegality: if the respondent exceeds its authority, it has no license at all: *Street on Ultra Vires*, 30. Some of the older judgments as to the Court's discretion do not represent the present state of the law. It is not necessary for the Attorney-General to show damage to the public: 18 *Halsbury's Laws of England*, 2nd Ed. 41 (e). The observations of James, L.J., in *Attorney-General v. Great Eastern Railway Co.*(19) were disapproved in *London County Council v. Attorney-General*(20) and in *Attorney-General v. Westminster City Council*(21). In view of *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*(22), *Attorney-General v. Ely, Haddenham, and Sutton Railway Co.*(23) is no longer regarded as law: *Attorney-General v. Kerr and Ball*(24) depends on the

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(12) [1909] 1 Ch. 70.

(13) [1908] 1 Ch. 727, 733, 736, 737.

(14) [1910] 2 Ch. 359.

(15) [1907] A.C. 415.

(16) [1915] A.C. 550, 561.

(17) [1902] A.C. 165.

(18) [1892] 1 Ch. 487.

(19) (1879) 11 Ch.D. 449, 482.

(20) [1902] A.C. 165, 168.

(21) [1924] 2 Ch. 416, 424.

(22) [1910] 1 Ch. 48.

(23) (1868) L.R. 6 Eq. 106, 111.

(24) (1914) 79 J.P. 51, 53.

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interpretation of the *Birmingham, Tame, and Rea* case(25); and it was therein conceded at the Bar that the Court had a discretion.

The following rules emerge from the authorities: (a) The Courts have naturally been jealous to preserve the power of the Court to control the issue of its own processes; (b) any emphasis that has been laid on the question of discretion has been directed to the object of vindicating the Court's position in the matter, and not to the purpose of depriving the Attorney-General of relief; (c) in certain cases the Court has delayed the issue of a writ of injunction, and in this sense it has exercised discretion; (d) in nuisance cases the Court, on rare occasions, has endeavoured to exercise a wider discretion; and (e) the balance of authority is at least in favour of the view that the Court does not exercise a discretion, if it has one, against the Attorney-General where there has been, or is going to be, an excess of the powers granted to a Corporation or to a private company.

Once the Attorney-General gives his fiat, he comes to the Court as guardian of the public interest. In *Stockport District Waterworks Co. v. Manchester Corporation*(26) the Attorney-General was not a party, and the injunction was not granted as the public interest was not involved: and see, also, *Attorney-General v. Ashborne Recreation Ground Co., Ltd.*(27), and *Attorney-General v. London and North-western Railway Co.*(28).

Section 319 of the Public Works Act, 1928, was enacted in the interest of public safety, and any departure from the terms of the license involves a risk to the public, which is not a matter for the Court to assess. Even if there is no breach of s. 319 but only a breach of the license, a question of public interest arises, whether or not the license is in terms treated as a contract, and action will lie, as a public right is created, when a statute has regard to public safety; and the Court will protect a public right by granting an injunction: *Wanganui Borough v. Gonville Town Board*(29).

As to alternative remedies: Reliance is placed on *Attorney-General v. Sharp*(30). In *Attorney-General v. Premier Line, Ltd.*(31), as the Attorney-General was joined because the public were sufficiently interested for him to enforce a public right. In *Attorney-General v. North-eastern Railway Co.*(32) the Attorney-General was entitled to bring an action, arising out of a contract, as the public interest was involved. The by-law in *Attorney-General and Lumley v. T. S. Gill and Son Proprietary, Ltd.*(33), 40

(25) [1910] 1 Ch. 48.

(26) (1862) 9 Jur. (N.S.) 266.

(27) [1903] 1 Ch. 101, 107, 108.

(28) [1900] 1 Q.B. 78.

(29) [1924] G.L.R. 281, 285.

(30) [1931] 1 Ch. 121, 124, 130.

(31) [1932] 1 Ch. 303, 306, 314.

(32) [1915] 1 Ch. 905, 917.

(33) [1927] V.L.R. 22.

- was not the type of statutory prohibition that could be met by an injunction. Statutory prohibitions fall into two categories—those in which the Court will not interfere with a claim for an injunction at the suit of the Attorney-General, and those in which
- 5 the Court will interfere: *Ramsay v. Aberfoyle Manufacturing Co. (Aus.) Proprietary, Ltd.*(34), where the Attorney-General was added as a party. The reasoning in the judgment of *Starke, J.*(35), explaining and following the English decisions is adopted. The two Australian cases are inconsistent with the
 - 10 long line of previous authorities: see *Attorney-General v. London and North-western Railway Co.*(36); *Attorney-General v. Shrewsbury Bridge Co.*(37); *London County Council v. Attorney-General*(38); *Attorney-General v. Premier Line, Ltd.*(39); *Attorney-General v. Mersey Railway Co.*(40); *Dundee Harbour*
 - 15 *Trustees v. D. and J. Nicol*(41); and *Attorney-General v. North-eastern Railway Co.*(42). The dissenting judgment of *Starke, J.*, is to be preferred to that of the majority in *Ramsay's* case(43), for the reasons given by him. Assuming the Australian cases to be correct on the facts, the present case is distinguishable
 - 20 because: (a) They are cases relating to the enforcement of by-laws, the enforcement of which was left to the local authority; (b) the public interest was not involved in those cases as here, so that no question of public safety arose; (c) the issue of a license in itself distinguishes this case, as a privilege has been granted to
 - 25 the respondent, and the public interest requires that the respondent should not exceed the privileged powers given by the license; and (d) no declaration was asked for in the Australian cases (as here), so they offer no answer to such a prayer.

- On the cross-appeal*: It would be an excess of power if the
- 30 defendant used its steam-power plant even in an emergency, as, in such an event, only the proper authority may grant a modification of the license. The Court may exercise its discretion differently from the manner exercised by the learned trial Judge, and so extend the scope of the injunction as granted by him, but,
 - 35 in any case, the terms should be specific: see *Kerr on Injunctions*, 6th Ed. 535; and *Attorney-General v. Logan*(44).

Astley, in support.

- (34) (1935) 54 C.L.R. 230.
- (35) *Ibid.*, 249.
- (36) [1900] 1 Q.B. 78.
- (37) (1881) 21 Ch.D. 752.
- (38) [1902] A.C. 165.
- (39) [1931] 1 Ch. 121.

- (40) [1907] A.C. 415.
- (41) [1915] A.C. 550.
- (42) [1915] 1 Ch. 905.
- (43) (1935) 54 C.L.R. 230, 249.
- (44) [1891] 2 Q.B. 100, 103.

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Rogerson, in reply. As to the license itself and the powers it confers: On its face, the license is a license under both s. 5 of the Public Works Act, 1908, and s. 2 of the Amendment Act, 1911 (now ss. 318 and 319 of the Public Works Act, 1928), and was unrestricted in its form for the transmission of electricity by hydro-power or steam-power or by any other mode of transmission. That being so, there must be a prohibition or limitation of that power before there can be said to be an illegal use of the transmission-lines; and that prohibition or limitation must appear in the license itself. There was a complete license under s. 318, and there is no need to go to s. 319 to obtain a license to transmit electricity generated by hydro-power. Consequently, the license granted under s. 319 could only be for the purpose of conferring power to transmit electricity, however generated: see s. 318 (8), which implies a power to use the hydro-generated power. The word "use" is employed or omitted indiscriminately in statutes giving powers in relation to electricity: it is not essential if other words (such as "transmit") are used which imply the right to use. If s. 318 gives power to use the lines, then s. 319 must operate for the purpose of giving a complete and unrestricted right of user of the lines for transmission of any type of electrical energy, however generated. If that be not so, then the license is upon its face a license under s. 319. Section 319 is a penal section, and it must be strictly proved that a prohibition exists in relation to the respondent. The recitals in the license are such as naturally and usually appear on a license to transmit power by hydro-generated electricity, and no limitation can be inferred from them. On its face, the license is a complete license, and no prohibition or limitation has been shown.

As to the Court's discretion: The four cases cited for the appellant relate to an excess of the powers granted under statute, memorandum of association, or charter, and are distinguishable on a consideration of implied powers. It is clear from the judgment in *London County Council v. Attorney-General*(45) that it deals only with the Attorney-General's right to initiate litigation, and the refusal to grant an injunction left it to the parties to exercise their other remedies, but it did not authorize the breach of the statute.

Ineffectiveness of the alternative remedy is not the main ground of the decision in *Attorney-General v. Sharp*(46) and it was so regarded in *Ramsay v. Aberfoyle Manufacturing Co.*(47).

(45) [1902] A.C. 165, 168, 169.

(47) (1935) 54 C.L.R. 230, 241, 242.

(46) [1931] 1 Ch. 121, 128.

The plain result of all the cases is that the Court has retained a discretion. In contests between a local authority and a private owner, the Court's discretion can be carefully exercised by making a declaration of right in lieu of granting an injunction. Under
 5 the license here, the Governor-General is the sole judge, and a tribunal is provided for the trying of breaches of the license: see *Grand Junction Waterworks Co. v. Hampton Urban District Council*(48) and *Ramsay v. Aberfoyle Manufacturing Co. (Aus.) Proprietary, Ltd.*(49).

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Cur. adv. vult.

MYERS, C.J. Even if the learned Judge below be right in holding that an injunction will lie, though limited in its extent and operation as he evidently intended, counsel are in agreement that the judgment as formulated cannot be supported. It was
 15 by the judgment adjudged and ordered:

"1. That in the circumstances shown to exist at the date of the
 "hearing of this action it is unlawful for the defendant company
 "to use for the purpose of transmitting and distributing electricity
 "generated by a steam-driven plant the electric lines which by
 20 "the terms of its license dated July 1, 1913, as amended by Order
 "in Council dated September 29, 1930, it was authorized to erect
 "and maintain.

"2. That in the circumstances shown to exist at the date of the
 "hearing of this action the defendant company, its servants or
 25 "agents, or any or either of them, be restrained from transmitting
 "and distributing over, along, and through the said electric lines
 "electricity generated by means of a steam-driven plant and
 "that a writ of injunction shall issue accordingly." The italics
 are mine.

30 Now, the first duty of the Court in granting an injunction is to lay down a clear and definite rule. If the language of the order in which the injunction is contained be itself ambiguous, uncertain, indefinite, giving no clear rule of conduct, the injunction becomes a snare to the defendant, who violates it, if at all, at the
 35 peril of imprisonment. The Court therefore should, in granting an injunction, see that the language of its order is such as to render quite plain what it permits and what it prohibits: *Low v. Innes*(1). An order which leaves the question between the parties undecided, but to be discussed upon a motion for breach
 40 of the injunction, is a very objectionable form of order: *Cother v.*

(48) [1898] 2 Ch. 331, 345.
 (49) (1935) 54 C.L.R. 230, 249.

(1) (1864) 4 DeG. J. & S. 286, 295,
 296; 46 E.R. 929, 932, 933.

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Midland Railway Co.(2). In *Attorney-General v. Staffordshire County Council*(3), it is said by *Joyce, J.*: "In my opinion it is
"the necessary requisite of every injunction and every mandatory
"order that it should be certain and definite in its terms, and
"it must or ought to be quite clear what the person against whom
"the injunction or order is made is required to do or refrain from
"doing"(4). See, also, *Ellerman's Lines, Ltd. v. Read*(5), per
Atkin, L.J.(6), and *Eve, J.*(7). As *Atkin, L.J.*, says, the judg-
ment as drawn up must contain the precise terms of the injunction
which is being granted(8).

The judgment in this case clearly violates that most important principle, and it is for that reason that counsel agree that it cannot stand as formulated. If an injunction is to go at all, the judgment must be altered and amplified so as to state with clarity, in such a way as that he who reads may understand, without having to inquire what the circumstances were which existed at the date of the hearing of the action, what is permitted and what is intended to be prohibited.

In the result, as neither party can tell from the judgment what the respective rights and obligations or liabilities are, both have appealed. The Attorney-General (whom I shall call "the appellant") claims to be entitled to an injunction without any qualification or limitation. The Cement Co. (which I shall refer to as "the company") cross-appeals, and claims that no injunction lies at all, or, alternatively, if it does, that it should be limited in its operation so as at least to enable the company's steam plant to be used for all the purposes of a stand-by plant and for the purpose of enabling the company to maintain and supplement the supply of electric energy at any time when the water available is insufficient for that purpose.

It is necessary, therefore, to begin the inquiry by considering whether the appellant was entitled to an injunction at all. It is claimed that the appellant was entitled to an injunction because, it is said, the company was committing continuous breaches of s. 319 of the Public Works Act, 1928, and the Court was bound to grant an injunction to prohibit further infringements of the section. In the view that I take, it is unnecessary to consider whether or not the Court would be so bound, and I refrain from discussing the numerous authorities cited on the point. I am prepared to assume for the purposes of this case, but without

(2) (1848) 2 Ph. 469; 41 E.R. (5) [1928] 2 K.B. 144.

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(3) [1905] 1 Ch. 336.

(4) *Ibid.*, 342.

(6) *Ibid.*, 157.

(7) *Ibid.*, 158.

(8) *Ibid.*

deciding, that, if the company were in fact committing continuous breaches of s. 319, an injunction would lie to prohibit future infringements. The material portion of s. 319 is subs. 1, which is as follows :—

- 5 No person shall lay, construct, put up, place, or use any electric line except under the authority of a license issued to him by the Governor-General in Council under this section. Every person who commits a breach of this provision is liable to a fine not exceeding one hundred pounds.

Now the learned Judge below has held that s. 319 clearly prohibits

- 10 the use of the company's transmission-lines for the purpose of transmitting any electric energy generated otherwise than by hydro-electric power. I entirely disagree with that conclusion.

When I come to discuss the terms of the license it will appear that the license was granted under s. 5 of the Public Works

- 15 Amendment Act, 1908, and s. 2 of the Public Works Amendment Act, 1911. At this stage, however, I may say that, as I view the case, these two statutory provisions required two distinct licenses: (i) a license authorizing the company to use water from the Wairua River for the purpose of generating electricity, and

- 20 (ii) a license to construct and use the transmission-lines, quite irrespective of the generating-power that might be used.

Although two distinct licenses are required, there is no reason why they should not be contained in one instrument. That was in fact done, and the instrument purports to be made, and the

- 25 licenses granted, under the powers conferred by (a) s. 5 of the Amendment Act of 1908, and (b) s. 2 of the Amendment Act of 1911. To my mind, s. 319 (1) of the present Act, like s. 2 of the Amendment Act of 1911, which section it reproduces, has nothing to do with the source or medium of the generating-power. If

- 30 the company were prosecuted on an information charging an offence under s. 319 (1), all it need do is to produce its license.

It is not disputed that the transmission-lines operated by the company are the very lines which are referred to in the license and in any plans relating thereto, and were the transmission-

- 35 lines intended to be licensed under s. 2 of the Act of 1911.

I repeat that s. 319 seems to have nothing to do and not to be in any way concerned with the generating-power. A person or company may without any license generate electrical energy for his or its own purposes to be used on his or its own premises

- 40 unless it requires to use water from any fall, river, stream, or other source for the purpose of generating such electric energy, in which case a license is required for that purpose. But there is nothing to prevent the licensee from using some other generating medium as well and from having on his premises a special plant

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for such purpose. No license is required in respect of that plant. Where any generating-power other than water is employed, a license is required only if transmission-lines are proposed to be used for the purpose of supplying energy beyond the owner's own premises, and that is precisely the same license as is required where water is used as the generating-power. The position is therefore the same in regard to the transmission-line, and the requirement is the same, no matter what the generating-power may be. It is clear, I think, that s. 319 (1) is merely a safety provision. It is purely in the interests of the public safety that a license must be obtained in respect of every electric line—and "electric line" is defined by subs. 3 of s. 319 as meaning

MYERS, C.J. a wire or wires, conductor, or other means used for conveying, transmitting, or distributing electricity for power, lighting, or heating purposes.

It is true that subs. 2 empowers the Governor-General to make regulations prescribing the form of licenses, &c., and

controlling the use and management of any works or lines used for generating, transforming, converting, or conveying electricity (whether so used pursuant to a license under this section or not) so as to secure the safety of the consumers or employees and of the public from personal injury by reason of such use.

Consequently, no matter what the generating-power might be, the works might be subject to regulations made under s. 319, but that is quite a different thing from the license in respect of the electric lines. In truth, as I think, the generating-power is quite immaterial for the purposes of s. 319. In my opinion, the production of the license would be a complete answer to any information under s. 319. If that is so, then clearly an injunction could not be granted to prohibit the continuance of breaches of s. 319, because there have not been and are not any such breaches.

That, however, does not determine the case. Mr. North contends that, apart from the statute, he is entitled to an injunction, because he says there have been breaches of the conditions of the license and the company's operations are in excess of the powers and authorities conferred by the license. If, however, as I think is the position, the appellant is forced to rely upon the license in that way, cl. 53 of the license says:

This license shall be deemed to constitute a contract as between the licensee and His Majesty the King and may be enforced as a contract by and against His said Majesty or the licensee accordingly.

This provision, in so far as the license is a license to use the water from the Wairua Falls, is in accordance with the express provisions of subs. 5 of s. 5 of the 1908 Amendment Act, and follows the precise wording of that subsection. Clauses 49 and 50 of the

license make provision for the consequences of failure or neglect on the part of the company. *Inter alia*, cl. 49 provides that if the licensee fails to observe, perform, fulfil, or keep any of the requirements, conditions, and provisions of the Public Works Act, 1908, or its amendments, to the full extent of the same or of any part thereof, or if the licensee shall fail to observe any of the conditions or obligations therein imposed upon the licensee, then and in such case it shall be lawful for the Governor by Order in Council either to revoke the license or to impose upon the licensee a fine not exceeding £100 for every week or part of a week of such default, such fine to be recovered in any Court of competent jurisdiction by any person appointed by the Governor to recover the same. I have already said that I am prepared to assume for the purposes of this judgment that if there were continuous breaches of the provisions of the statute an injunction would lie. But in respect of any failure or neglect to observe conditions or obligations imposed by the license, it seems to me that the license affords an adequate and effective remedy. Furthermore, cl. 51 provides that the Governor shall be the sole judge of the fact whether the requirements of the license have been complied with, and he may from time to time cause inquiry to be made into any matter connected therewith or arising under the license in such manner as he thinks fit, and his decision shall be final: provided always that the clause shall not affect the rights of any person, corporate body, or local authority in cases of damage or injury for which an action by such person, corporate body, or local authority may lie against the licensee.

There have been cited a great many authorities, such as *Attorney-General v. Sharp*(9) and *Attorney-General v. Premier Line, Ltd.*(10), to the effect that where the rights of the public are involved by the action of a defendant and the remedies provided by statute have proved to be ineffective the Court has jurisdiction to grant an injunction at the instance of the Attorney-General by way of ancillary relief. I do not myself think that these authorities apply to the circumstances of this case. Apart from the fact that the remedies provided by the contract would seem to be adequate and effective to meet the case of any failure or neglect on the part of the company to observe the conditions and obligations imposed by the license, the case here seems to be purely a matter of contract, and the remedies to depend upon the terms of that contract. I asked during the argument whether counsel had been able to find any case where a question of this

(9) [1931] 1 Ch. 121.

(10) [1932] 1 Ch. 303.

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kind had arisen under an express contract between the Crown and some person or corporation, and Mr. North answered by citing *Attorney-General v. North-eastern Railway Co.*(11). That, however, is quite a different case. There is nothing to show in the report that the Light Railway Order then in question 5 provided for any remedy which might have been taken by the Crown as there is in this case: an injunction was the only remedy available. I am inclined to think that if it is alleged here that there have been breaches of contract by the company, the matter is one to be determined in the manner prescribed by the license 10 itself. But, by reason of the matter to which I propose next to refer, it is unnecessary to express a concluded opinion on this point.

In addition to asking for an injunction, the appellant by his statement of claim prays a declaration that the transmission and 15 distribution of electricity by the company alleged in para. 12 of the statement of claim is unlawful and in excess of the authorities granted by the license. Clause 12 of the statement of claim is as follows:—

The defendant company, however, has operated and is operating at or about its works at Portland aforesaid certain steam-driven plant or machinery 20 and by the use thereof produces and generates electricity; and the defendant company unlawfully and in excess of the authorities granted by the said license has transmitted and distributed beyond the limits of its own property and continues so to transmit and to distribute over, along, and through the 25 electric lines erected, used, and maintained pursuant to the said license electricity produced and generated by means of the said steam-driven plant or machinery.

It is, as I understand, desired by the Attorney-General in any case that the Court shall consider the position under the license, 30 and I therefore proceed to do so. This course seems not unreasonable as, although I have indicated my present impression on the point, it is at least doubtful whether, even considering the case under the license alone, a remedy by injunction would not be open. 35

In the consideration of that aspect of the case, it must not be lost sight of that the provisions under which the company obtained its rights are s. 5 of the Public Works Amendment Act, 1908, and s. 2 of the Public Works Amendment Act, 1911. Those two sections have entirely separate and distinct objects. It is 40 necessary, however, first to look behind those two Amendment Acts at the Public Works Act, 1908 (consolidated), and the Post and Telegraph Act, 1908 (consolidated). By Part XII of the consolidated Public Works Act, 1908, it was provided in s. 267 (1)

that, subject to any rights lawfully held, the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power shall vest in His Majesty. And s. 268 enacted that :

- 5 The Governor may from time to time, by Order in Council gazetted, delegate to any local authority, on such conditions as he thinks fit, the right to use water from any lake, fall, river, or stream for the purpose of generating electricity for lighting or motive power.

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- It will thus be seen that the Governor's power of delegation
- 10 under s. 268 extended only to delegation to a local authority. The matter of granting a license for a transmission-line was not dealt with at that time by the Public Works Act at all, but by the Post and Telegraph Act, 1908. It was enacted by s. 171 (1) of that Act that no local authority, company, or person should,
- 15 whether with or without the consent of the owner or occupier of any building or erection of any kind, lay, put up, or in any way erect or place any electric line for lighting purposes which passed over, along, or across any other electric line, whether used for purposes of communication or for lighting purposes, or for any
- 20 other purpose connected with electricity, without a license to be obtained as thereafter provided. Section 172 enacted that the Minister—*i.e.*, the Minister of Telegraphs—or any officer of his Department appointed by him from time to time for that purpose by a notification in the *Gazette*, might grant and issue
- 25 licenses under that Part of the Act in any case where the applicant desired to lay, or put up, or erect and maintain an electric line for lighting purposes; or where an electric line for lighting purposes had already been erected and the applicant desired to continue and maintain the same, subject to certain conditions, one of which
- 30 was that the license should state the course and direction of the electric line mentioned therein. Section 175 of the Act was as follows :—

- (1) Except in respect of lines constructed by the Governor or a local authority as aforesaid, no person shall lay, construct, put up, or place any
- 35 electric line for lighting purposes as an undertaking of a public nature, except under the authority of a special Act.

- (2) This provision shall not extend to any case where the electric line used or intended to be used is not laid, conveyed, or placed, or intended to be laid, conveyed, or placed, beyond the limits of the building or premises
- 40 in which the electricity is generated for such lighting purposes.

- It will be seen, however, that the license for the transmission-line under s. 172 had nothing whatever to do with the source of generating the electricity, and was quite independent of and had no reference to any delegation by the Governor to a local authority
- 45 of water rights under s. 268 of the Public Works Act, 1908.

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Then came the Public Works Amendment Act of 1908, s. 5 of which empowered the Governor, notwithstanding anything contained in Part XII of the principal Act—*i.e.*, the consolidated Act of 1908—or in the Post and Telegraph Act, 1908, from time to time by Order in Council to grant to any person or body corporate (referred to in the Act as “the licensee”) a license to use water from any fall, river, stream, or other source, for the purpose of generating electricity for electric light, mechanical power, or other uses, and to exercise in respect of that purpose any of the powers and authorities thereafter specified in that behalf. By subs. 8 it was enacted that the license

may confer upon the licensee, *inter alia*, a right at any time or times under the continuance of the license, but subject to such conditions and restrictions as are expressed in the license, to enter upon any road . . . and there to construct, erect, lay down, maintain, renew, or repair all such cables, wires, and other things as are required for the transmission of electricity between the fall, river, stream, or other source aforesaid and any place to which the licensee is authorized to transmit electricity in pursuance of the license.

Then came the Public Works Amendment Act, 1911, s. 2 (1) of which enacted that :

No person shall lay, construct, put up, place, or use any electric line except under the authority of a license issued to him by the Governor in Council under this Act. Every person who commits a breach of this provision is liable to a fine not exceeding one hundred pounds.

Possibly, between the time of the passing of the 1908 Amendment Act and the 1911 Amendment Act, one license may have been sufficient under s. 5 of the former Act to enable the licensee both to take and use the water (subs. 1), and to construct and use the transmission-line (subs. 8). But whether that be so or not need not be considered, because the fact is that the license in the present case was not issued until after the 1911 Amendment Act was passed, and it would appear that after the passing of that Act two licenses were necessary, one to take and use the water and another (but this was irrespective of water being the generating-power employed) to construct and use transmission-lines. There was nothing to prevent the two licenses being contained (as in the present case) in one Order in Council, but, nevertheless, they seem to me to provide for two separate and distinct things. Section 5 of the 1908 Amendment Act and s. 2 of the 1911 Act are now respectively reproduced as ss. 318 and 319 of the Public Works Act, 1928. Reference to the last-mentioned Act, however, and to the Acts which preceded it shows that s. 5 of the amending Act of 1908 was enacted as part of the expression of the policy of the Legislature to control the water resources of the Dominion and to conserve them primarily for the benefit of the State. The section has no relation to the question of the use

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of any other agency than hydro-power for the generation of electricity. And s. 2 of the 1911 Amendment, as I have already said, had nothing whatever to do with what may be said to be the source of supply of the power used, but was merely a provision

5 (taking subss. 1 and 2 together) for the purpose of requiring that transmission-lines should be so constructed as to ensure as far as possible the public safety. If that is so, then so long as the company is performing its obligations and continues to use water from the Wairua River in accordance with the provisions

10 of the license, it would seem to me to be quite immaterial from the Crown's point of view if portion of the electricity transmitted over the lines is generated by some agency other than water. Certainly I can find nothing in the license to prohibit this being done, and I cannot help thinking that it must be held to be

15 impliedly permitted. Mr. North suggests that the policy of the Legislature was altered when the Electric-power Boards Acts were passed, and particularly by the Electrical Supply Regulations made in 1935: see 1935 *New Zealand Gazette*, 2495, Reg. 27/04. But I do not see how the construction of an Order in Council made

20 in 1913 can be affected by the advent in the district many years afterwards of a Power Board which has come into existence under the subsequently enacted Electric-power Boards Acts and has only lately become placed in a position to supply electric energy within the company's area of supply. It is that Power Board at

25 whose relation the Attorney-General has brought this action. The operations which are objected to as being in excess of the company's powers have been consistently carried on for years, without any question of *ultra vires* ever being raised. If the injunction stands, the result will probably be that the company

30 will either lose a portion of its business or be compelled to purchase at least portion of its requirements of energy from the Power Board instead of generating it itself. The Order in Council contemplated (and I think required) that the company would continuously maintain a supply of electricity within its area, and in addition,

35 of course, the company required electric power for its own manufacturing purposes. To enable all that to be done a license was granted to take and use the water of the Wairua River, but I can see nothing in the license or in any of the statutes to prevent the company, if necessary, from generating electric energy by

40 means of any other medium as well, and from transmitting such electric energy over the transmission-line in respect of which it held a license as required by statute in that behalf. Mr. North contends that, if the company wishes to use steam-power to

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generate electricity to be supplied outside the company's own manufacturing premises, it must obtain a license. But why? And for what purpose? Another license is not necessary for the generation of electricity by steam-power. That the company may do without a license. Nor is a license necessary to construct and use electric lines for the transmission of electricity. That the company has already. Mr. North suggests that the company has not a right in gross to use its lines. He cites *Marriott v. East Grinstead Gas and Water Co.*(12) and *Attorney-General v. Frimley and Farnborough District Water Co.*(13). Such cases are, in my view, distinguishable. The company does not claim the right to construct lines *ad libitum* within its area of supply. It can only construct such lines as are licensed, and its transmission of electricity must be strictly confined to those authorized lines and to the limited capacity thereof. But, if I am right, the company is not restricted to the transmission of electricity generated by water-power only. 5 10 15

Not only do I think that the transmission of electricity generated by steam-power is not prohibited, but, as I have already said, I think that—to a certain extent at all events—it is impliedly permitted. Mr. North contends that an implied power does not arise merely on the ground of convenience, and he cites such cases as *Attorney-General v. Leicester Corporation*(14), *Attorney-General v. Mersey Railway Co.*(15), *Dundee Harbour Trustees v. D. and J. Nicol*(16), and *London County Council v. Attorney-General*(17). This is, in my view, quite a different class of case. The company is required to perform its obligations under the license. The fact is that for eight months of the year or thereabouts the water-supply is continuously adequate to enable the company's obligations to be performed. During the four summer months, however, the supply of water is irregular, and at times is inadequate to enable the company's obligations to be performed. Ever since 1920 the company has had a steam plant at its works at Portland, and that steam plant has been subsequently increased. The fact is, however, that it is only during portions of the period of four months in each year that the steam-power is actually required. That being so, notwithstanding the opinions of some of the engineering witnesses to the contrary, it seems to me that the steam plant can fairly be described as a stand-by plant. It is, no doubt, true that the company has used the steam plant to a greater extent than 20 25 30 35 40

(12) [1909] 1 Ch. 70.

(13) [1908] 1 Ch. 727.

(14) [1910] 2 Ch. 359.

(15) [1907] A.C. 415.

(16) [1915] A.C. 550.

(17) [1902] A.C. 165.

was actually necessary. But that is not what Mr. North complains of. His complaint is that the company is not entitled to use the steam plant at all. In my opinion, that is wrong. If by reason of the water-power being insufficient, or for any other

5 cause, it is necessary for the company to use some other agency to generate electricity in order to enable it to supply energy as required or as contemplated by the Order in Council, then the right to use such agency for that purpose is, in my opinion, a matter of necessary implication.

- 10 In the view that I take, it is unnecessary to consider the point which was argued at some length as to the Court's discretion. If the views I have already expressed were wrong and the appellant were entitled to an injunction but the Court had a discretion in the matter, there is a good deal to be said
- 15 for exercising such discretion in the company's favour. But I am disposed to think that, if Mr. North were right in his main point—namely, that the Attorney-General is *prima facie* entitled to an injunction by reason of continuous breaches of s. 319 of the present Act—the weight of authority is that the Court could not
- 20 exercise its discretion in the direction of refusing an injunction and permitting the continuance of breaches of the statute. If, however, the appellant were held entitled to an injunction by reason not of breaches of s. 319, but merely of breaches of the conditions of the license—*i.e.*, breaches of contract—the position
- 25 might be different, because of the fact that the Crown apart from an injunction has the remedies in its own hands. But it is not necessary for me to consider this aspect of the case: it does not arise if I am right in thinking that no case for an injunction has been made out.
- 30 In my opinion, the company's cross-appeal should be allowed. This involves the setting-aside of the judgment and the consequent dismissal of the Attorney-General's appeal.

BLAIR, J. I agree with the judgment of the learned *Chief Justice*(1).

- 35 Once the potential energy latent in water (at a high level), coal, oil, suction gas, or the wind or tides, or any other source of energy, is converted into electrical energy, then such electrical energy entirely loses the character of its source and becomes merely energy in a particular form—*i.e.*, the electrical form. The
- 40 transmission-lines are not hydro-electric transmission-lines, they are merely lines for the transmission of electrical energy,

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howsoever generated. When, therefore, a license is granted under s. 319, such a license is a license to construct and use an "electric line," and such a line is a line capable of transmitting electrical energy. It means that, and nothing more and nothing less. All electrical energy is only energy in the electrical form, whatever its voltage or amperage and whatever its source. The learned Judge in the Court below has assumed or read into that part of the company's license which authorizes the use of an electric line a limitation as to the source from which such electrical energy is to be created, or he may have assumed that electrical energy converted from hydro-power is something different from electrical energy converted from some other source of energy. A license to lay a particular sized water-pipe is a license to use such a pipe to its full capacity, and likewise a license to erect an electric line for transmitting electrical energy is a license to use such line to its full capacity.

Had it not been for the fact that the company proposed to use water-power, the only license it would have required would have been one to use and erect electric lines which is one of the licenses it has. It is a mere accident that in this case the company desired to use water-power for which a special license was, in accordance with our statute law, required. The use of water-power for the generation of electrical energy is a Government monopoly in New Zealand, and any corporation desiring to make use of water-power has to obtain a license from the monopolist to do so. That is the only reason why the license to use water-power was applied for and obtained by the company.

As pointed out in the judgment of the learned *Chief Justice*, but for the accident that the company desired to use water-power, only one license—the license to erect and use electric lines for transmitting electrical energy—would have been required. Indeed, in my view, if the company elected to cease using water-power and relied entirely on its steam plant, that part of its license conferring the right to erect and use electric lines would be all it required for that purpose.

JOHNSTON, J. The respondent company, which carries on business as manufacturer of cement near the Township of Whangarei, is the assignee, with the consent of the Governor-General in Council, of a license dated July 1, 1913, granted by the Governor-General in Council to use the waters of the Wairua River to generate electricity for transmission and distribution within a named area of supply, which includes the Town of

Whangarei, and a license by the same authority to erect and maintain electric lines for lighting and power purposes.

The scheme for electric-power transmission proposed by the respondent company's predecessor in title—the Dominion Portland
 5 Cement Co., Ltd.—necessitated, if it were to be carried out, a grant from the Crown in whom was vested the use of water rights in New Zealand to use the water of the Wairua River, and a license from the Governor in Council to erect and maintain electric lines.

The power to confer a grant of water rights for such a purpose
 10 was at the date of application for licenses given to the Governor by s. 5 of the Public Works Amendment Act, 1908. To such power was added the right to determine the terms upon which a grant should be made. The power to license the erection and use of transmission-lines was conferred on the Governor in
 15 Council by s. 2 of the Public Works Amendment Act, 1911.

On application for the necessary licenses, the purpose of the application was disclosed as being, in addition to the purpose of the applicant's own works, the distribution of lighting-power to the named area of supply and in particular to the Borough of
 20 Whangarei, which in its turn had applied for a license under s. 2 of the Public Works Amendment Act, 1911, to erect and maintain transmission-lines within its boundaries and entered into an agreement to take its bulk supply from the company. By subs. 5 of s. 5 of the Public Works Amendment Act, 1908, a license to use
 25 water for such purposes is deemed to constitute a contract between the licensee and His Majesty the King and to be enforceable by and against either party accordingly.

It has been argued, and it is possible on a construction of subs. 5 of s. 5, that a right to erect and use transmission-lines
 30 could have been conferred by that section itself without reliance upon s. 2 of the Act of 1911. In fact, however, the two licenses were embodied in the one Order in Council which, while it is described as a license authorizing the Dominion Portland Cement Co., Ltd., to use water from the Wairua River for the
 35 purpose of generating electricity and erect lines in the Provincial District of Auckland, is by its 53rd and last clause "deemed to constitute a contract as between the licensee and His Majesty the King and may be enforced as a contract by and against His Majesty or the licensee accordingly."

40 The license of water rights and the license to erect and maintain transmission-lines are expressly declared to be in pursuance of the powers conferred by the already cited s. 5 of the amending Act of 1908 and s. 2 of the Act of 1911. Accordingly,

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whether or no the Governor in Council could have granted applicant the right to erect and maintain transmission-lines under s. 5 alone, in fact the Governor in Council *nominatim* invoked his powers under s. 2 of the Act of 1911 for the purpose.

It is quite clear, in my opinion, that the license contemplated pursuant to the powers given the Governor in Council by s. 2 of the Act of 1911 is not limited, and was not intended to be limited, to the transmission of electricity generated in one manner more than in any other. The purpose of restricting the use of electric transmission-lines to licensed persons is indicated by the terms upon which licenses are granted as being the safety of employees, and members of the public, who, if the lines are carried along highways and grounds outside a person's own premises, may be brought in contact with them. The importance of the license consists, in short, of the precautionary measures relating to construction and use embodied in it.

The method of generation not being in any sense relevant or effective to the purpose of the license, a proviso limiting the scope of the license to transmission of electricity generated by water-power alone would be repugnant to the known history and usefulness of the section under which licenses could be granted.

Licenses under the section have been commonly issued on the same terms, whether as a matter of fact the known proposed method of generation is water or steam power. Nor does one find in the particular license in question issued on July 1, 1913, any indication at all that such a limitation on the powers granted pursuant to s. 2 of the Act of 1911 is intended.

So far as the provisions of that license relate to the erection and care of the proposed transmission-lines, they are common terms adapted to ensure safety independent of the method of generation, and I can see nothing in the particular license which signifies that the particular use by the Governor in Council in this case of the powers he could confer by s. 2 are limited in a manner not relevant to the purpose for which the license is intended. Consequently, I am unable to subscribe to the proposition adopted in the judgment appealed from that the terms of the license itself determine whether or no a breach of s. 2, which authorized the grant of the license, has been committed.

Indeed, it appears the statement of claim relies not on breach of the statute but on use exceeding a use granted by the terms of the license itself, the contention being that the license by its terms permits the transmission of hydro-generated electricity only, and that the transmission of steam-generated electricity

is not authorized by the license. Indeed, it was not, I think, argued before us that a license under s. 2 could not, and did not *per se* without limiting words in the license itself, authorize transmission of electricity over lines whatever the generating force
5 might be.

Fair, J., however, came to the conclusion, interpreting the section by reference to the license, that transmission of steam-generated electricity was a breach of the provision of that section(1). With respect, I think the method of interpretation
10 adopted by the learned Judge to answer the question he was considering was fallacious, and I find myself unable to agree with his conclusion that such transmission constitutes a breach of the statute. The question as to whether it constitutes a breach of the terms of the license is a different matter.

15 Subsection 1 of s. 2 of the Act of 1911 provides that :

No person shall lay, construct, put up, place, or use any electric line except under the authority of a license issued to him by the Governor in Council under this Act. Every person who commits a breach of this provision is liable to a fine not exceeding one hundred pounds.

20 What then constitutes a breach of this section ? Clearly erecting and maintaining or using any electric lines without a license. Here the respondent company has a license issued to it under that section. So long as it has that license, it cannot, I think, be said that there is a breach of the section.

25 Assuming, however, running steam-generated electricity over the lines did constitute a breach of the section, and assuming that any member of the public has an equity of some sort that is affected by the breach or even one so remote from proprietary as an interest in seeing the law obeyed, action by the Attorney-
30 General on the relation of a member of the public might, on the authority of *Attorney-General v. Sharp*(2) and *Attorney-General v. Premier Line, Ltd.*(3), be well founded, and, indeed, it is on these assumptions that the judgment of the learned Judge appealed from seems to have been based ; he holding the opinion that in
35 such circumstances an injunction should issue not, indeed, as a matter of right, but as a matter of course.

On these assumptions, while on the authorities it appears that where the Legislature has itself, as here, named the penalty for a breach of the provisions in question, and the terms in which the
40 sanction is imposed or the intendment of the statute makes it clear the sanction is exclusive, an injunction will not lie, it can be further conceded that in this case, although the statutory sanction

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(1) *Ante*, p. 145, l. 34.
(2) [1931] 1 Ch. 121.

(3) [1932] 1 Ch. 303.

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has not proved abortive, its presence—that is, the imposition of a fine of £100, imposed by s. 2 on a breach of its conditions—does not of itself bar relief by issue of an injunction, if there is an equity to protect.

But in the argument before us very little was said to show with any degree of precision what equity was entitled to protection, what public interest was affected, or in what way the law, so far as the public was concerned, could be more effectively observed than was being done. And, in my opinion, for the very good reason that no equity of any kind in any member of the public is affected, and the purpose of the statute is being carried out to the full. If this is so, there is nothing upon which to rest the claim for an injunction. Nevertheless, however tenuous the right may be, it needs examination, and I proceed to that.

At the time the licenses were issued, and for many years previous, rights in the water of rivers and lakes were vested in His Majesty, and the right to erect, maintain, and use transmission-lines was prohibited without license. No member of the public had any right to demand either license or any right to dictate the terms upon which such licenses should be granted. That position obtains to-day.

It is not suggested that there is any public interest which founds a right to interfere in the terms upon which licenses can be granted. Those terms are a matter for the sole discretion of the Governor in Council, and the Court cannot interfere with the exercise of the Governor in Council's discretion in this respect.

It may be, however, that the public interest can be invoked to prevent individuals erecting and using transmission-lines to convey electricity without license on the ground that public safety is involved. Public interest, on the other hand, although members of the public might feel aggrieved that water rights were being used by individuals without license, cannot be a ground to compel His Majesty in whom such rights are vested to protect his rights of property.

Unless, then, the statute vests some right in the public, which I am too blind to see, the relator is forced to show that the public interest he relies on consists in a right to have transmission-lines licensed, and that this is being neglected. From 1913 to 1920 the respondent company, and its predecessor in title, used its transmission-lines to convey electricity hydro-generated in its authorized area of supply under conditions as to safety contained in its license. From 1920 to date it has conveyed along those lines electricity generated by steam-power as well as by water-

power, the necessity for using steam-power arising from the fact that during certain months of the year the water-supply from the Wairua River was not sufficient to meet the demands made on the company by its consumers and the operation of its own
5 works.

The precautionary measures for safety in use and transmission remained the same, and, indeed, more could not be demanded, because, as pointed out by *Blair, J.*(4), conditions relating to safety are in no sense dependent upon the method of generation.

10 So far, therefore, as the interest of the public can only arise if use in the absence of a license implies that public safety is endangered, it has not in fact arisen inasmuch as the company operates under a license and the terms of the license have in this respect been complied with. No question that any public interest
15 was adversely affected or had arisen has been advanced till the relator's claim made immediately prior to the commencement of these proceedings, and, even then, the relator does not rest his claim on the ground that the respondent company is operating without a license and so affecting the right of the public to demand
20 that the use of transmission-lines should only be made on terms as to safety provided for by the Governor in Council.

The relator came into existence as a public Board by virtue of the Electric-power Boards Act, 1925. Such Boards undertake the purchase, supply, and distribution of electric power throughout
25 the districts under their control, and to carry out their duties are given wide powers in regard to finance, including authority to impose rates on property within their districts.

The Township of Whangarei is within the confines of the relator Board's district, and the relator, who is now in
30 a position to supply power to certain parts of its district, including the Township of Whangarei, is anxious that that township should, so far as is possible, become a consumer of its supply. The Township of Whangarei, however, has its contracts for supply with the respondent company, and has intimated that it suits
35 its interest to remain a customer of the company under its contract rather than to become a consumer of the relator Board's supply.

It is unquestionable that to obtain custom of the Township of Whangarei would be an advantage to the relator Board, and
40 negotiations were entered into between the relator Board and the respondent company by which the company should take from the Board a certain portion of its power and so enable the

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company to meet its customers' demands without the necessity of generating power by steam during the months when the supply of energy from the Wairua Falls was, owing to shortage of water, insufficient. These negotiations, however, fell through, and on their failure, and no doubt on failure to induce the licensing authority to revoke, limit, or extend the license enjoyed by the respondent company, these proceedings have been taken. 5

It is quite clear that it is not open to the relator Board to interfere by action in the contract made between His Majesty the King and the respondent Board or interfere with the terms of the license under which the respondent company has power to use its transmission-lines. Consequently, the Board makes a claim, not as a trading Board, but *qua* a member of the public, that the public interest demands that the transmission-lines of the respondent company should be used not otherwise than for the transmission of hydro-generated electricity. 15

The purpose of the action is, as I have said, to force the respondent company or the Whangarei Borough Council willy-nilly to take a certain amount of electric power from the Board. While admitting that it is fighting for its own hand, the Board says that it is the policy of the Electric-power Boards Act and fundamental to the Government policy of supplying electric power to towns and country districts throughout New Zealand at as cheap a rate as possible that every area of consumption should be available to the Board and that, in the particular district in which it operates, it is a matter of public welfare in that, if outlying districts are to be properly served, revenue from the one large town of the district should be obtained. 20 25

In my opinion, however much more profitable and convenient it may have been for the Board to step into its district and find it without existing systems supplying electric power, equity does not demand that a firm that has inaugurated and successfully carried on under licenses the supply of electrical power for a period of twenty-five years, and for that period served the needs of its area of supply to the satisfaction of the public concerned, should give up part of its business to increase the profits of the Board. *Prima facie*, public interest does not demand that the rights of the individual be sacrificed in this way. 30 35

In my view on these facts, even on the Attorney-General's fiat, an injunction cannot be maintained. 40

From the facts it appears to me no right emerges to maintain what *Jessel*, M.R., in *Cooper v. Whittingham*(5), described as

"the ancillary remedy in equity to protect a right"—that is, an injunction—a remedy not substitutional but supplementary. The Court interferes by way of injunction to preserve and secure enjoyment of a right, whether it is positive or negative, and here I can see no positive interest susceptible of enjoyment by His Majesty's subjects as of common right to be protected.

In *Ramsay v. Aberfoyle Manufacturing Co. (Australia), Proprietary, Ltd.*(6), decided by the High Court of Australia, Rich, J., says: "Old-fashioned views upon the jurisdiction of Courts of Equity find the growth of the use of injunction more repugnant than satisfying. An Attorney-General's fiat does not entitle a relator to succeed on a somehow equity or on no equity at all"(7).

It appears to me that the somehow equity sought to be established in this case is no equity at all. In *Ramsay's* case, just cited, and in *Attorney-General and Lumley v. T. S. Gill and Son Proprietary, Ltd.*(8), the nature of the public interest that will enable the Attorney-General to maintain a suit for an injunction is discussed in the several judgments at considerable length and with great learning. From the headnote of the latter case I take the following: "To enable the Attorney-General to maintain a suit for an injunction to restrain the impairment of public rights or interests, the statute must create an interest of the required character, and vest its enjoyment in the public. Interests invested in classes of people, however extensive, are private rights; and neither require nor admit of the intervention of the Attorney-General."

In the first of the cases cited, it was held that the Supreme Court properly exercised its discretion in refusing the special remedy of interlocutory injunction notwithstanding the Attorney-General's fiat.

It is perfectly true that it appears the High Court had some difficulties in reconciling *Attorney-General v. Sharp*(9) and *Attorney-General v. Premier Line, Ltd.*(10), with their view of the principle running through the authorities. There is, however, quite sufficient in the facts of this case to distinguish it from the two last-mentioned English cases, the High Court of Australia pointing out that it was clear from the facts of those two cases that the illegal conduct of the defendants respectively tended to the injury of the positive right of the public to orderly and regulated transport.

(6) (1935) 54 C.L.R. 230.

(7) *Ibid.*, 245.

(8) [1927] V.L.R. 22.

(9) [1931] 1 Ch. 121.

(10) [1932] 1 Ch. 303.

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In my opinion, on the authority of the Australian cases cited, some precise right must be shown to be in question for which protection is needed before an injunction can be granted. It may be that the nature of the right need not be of a strictly proprietary nature and the category of cases capable of sustaining the grant of an injunction will never be closed, but I think it is clear that something more precise must be shown, using the words of *Rich, J.*, than "an anyhow equity"—and I think that nothing more is shown here, even if that much be shown—before an injunction even on the fiat of the Attorney-General can be maintained.

For these reasons, I think the order for an injunction must be set aside and the appeal of the respondent company allowed, with costs in this Court and in the Court below.

The statement of claim asks for a declaration that the transmission and distribution of electricity by the defendant company of steam-generated electricity is unlawful and in excess of the authorities granted by the said license. I have already stated that, in my opinion, the relator has no right to ask for an interpretation or to claim any relief in respect of the terms of the contract made between His Majesty the King and the respondent company, nor has this Court any right to interfere by way of injunction with the discretion Parliament has given the Governor in Council in determining the condition and terms of licenses it has authorized. We should, in my opinion, make no such declaration as is asked for at the suit of the relator.

Nor, again, do I think the Attorney-General in these proceedings, where he acts on the relation of a private individual, can ask for such a declaration. The Attorney-General has stated that in regard to these proceedings he maintains a neutral attitude. That may be justifiable so far as a claim for an injunction is concerned. The claim for an interpretation of the Crown's contract is not, I think, germane to a suit for an injunction instituted by a member of the public on the fiat of the Attorney-General. The Attorney-General is plaintiff, representing interests of the public; but he also represents the Crown, and while on matters relevant to the alleged impairment of public rights, he may, as he claims here, be neutral, he cannot be both plaintiff and defendant and remain neutral on a question concerning the Crown's rights in a contract to which His Majesty the King is a party.

I think, therefore, no such declaration as is asked for should be made, and that we should express no opinion on that contract

beyond what necessarily emerges from a discussion relevant to the claim by the relator for an injunction. The contract itself is expressly stated to be enforceable at the suit of either party, and ample powers are given to the Crown to enforce compliance of its terms by the licensee, a special clause being inserted to the effect that the Governor shall be sole judge of the facts whether the requirements of the license have been complied with. This Court should not, therefore, in my opinion, determine questions dependent on the construction of the contract unless the Crown is actively represented.

As a result of my view that the order for an injunction must be set aside, it follows that the appeal of the Attorney-General must be dismissed, and it becomes unnecessary to consider the form of the injunction.

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15 NORTHCROFT, J. I have had the opportunity of reading the judgment delivered by the *Chief Justice*(1), with which I am in agreement. It is unnecessary, therefore, that I should do more than state my reasons very shortly.

Counsel for both parties acknowledged that the injunction in the form in which it was settled was defective. If for no other reason I should have been disposed to agree that it be set aside as it offended against the well-settled rule that an injunction must state in precise terms just exactly what is forbidden to be done.

The injunction is sought on the ground that the respondent has been committing continuous breaches of s. 319 of the Public Works Act, 1928. Before that Act was passed, the respondent obtained its license under the authority of the legislation then operative—viz., s. 5 of the Public Works Amendment Act, 1908, and s. 2 of the Public Works Amendment Act, 1911. The former of these enactments required a license from the Crown before power could be generated by water-power. The latter made a license necessary if power, however generated, were to be conveyed by transmission-lines beyond the property of the licensee. The former enabled the Crown to control the available sources of water-power for the generation of electricity; the latter ensured the safety of transmission-lines beyond the licensee's property.

In this case one license was issued but, having regard to the different statutes by which it was authorized, it must be regarded as two separate licenses. In that case as much of the license as is referable to the transmission-line must be treated as a separate license issued under s. 2 of the Act of 1911. That section has

(1) *Ante*, p. 155, l. 11.

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Henry Arthur Penny, of Dunedin, traveller: I was a member of a party that went to Kaitangata. All the members of the party were members of the City Lodges of Oddfellows. It was confined to such members. I hired a vehicle on their behalf from the Dunedin City Corporation. So far as the Dunedin City Corporation was concerned it was a private party. We went to one of our Lady Lodges in Kaitangata. Occasion was the tenth anniversary of the Lodge in Kaitangata. It was a special occasion both for us visiting and for the Kaitangata people who were receiving us. It was quite a good night.

Cross-examined: I could not say the number of Kaitangata members of the Lodge. There would be about forty to fifty Kaitangata people present at the function. Two full bus loads—fifty-four altogether went from Dunedin. There are fifteen hundred to two thousand members of Oddfellows Lodges in Dunedin. I got quotation for bus at a lump sum.

In *Scott's* case the evidence was as follows:—

Helen Sellar, clerk at Stephens Kins, Dunedin: One of my activities is the Dunedin Methodist Central Mission. On January 8, 1939, I hired a bus on behalf of the Mission for a trip to Nelson. Party was confined to Boys' and Girls' Bible Classes. It was confined to young people of our Mission and the Trinity Methodist Church. For twelve months the trip had been in contemplation. Organizing of the trip was going forward and the young people were allowed to contribute so much a week. Nothing definite, but according to their means. We estimated what it was going to cost, and they saved up to assist the cost for what was a very special occasion. Some of them had never been to Nelson before. Through this organization they were able to do so very reasonably indeed.

Cross-examined: On first day went Dunedin-Christchurch, one day. Christchurch-Hanmer Springs, one day. Through Lewis Pass to Murchison. Murchison to Westport, one day. Westport-Greymouth and Reefton, one day. Reefton-Nelson, one day. Left Dunedin December 24, arrived Nelson December 31, 1938. Stayed in Nelson till January 3, 1939. From Nelson to Blenheim and Picton. Then Kaikoura-Cheviot-Timaru-Dunedin. We were away fifteen days. We wanted to go to Nelson as culmination of our trip. On Sunday we went to the Children's Health Camp and the Children's State School. The whole trip was special in that we looked forward to it for twelve months. It was a great thing for the Nelson people to have Dunedin people visiting them and taking part in their services.

F. B. Adams, for the appellant.

A. N. Haggitt, for the respondent.

Cur. adv. vult.

SMITH, J. [After stating the facts, as above:] For carrying on its passenger services, the Corporation holds continuous licenses under s. 29 (a) of the Transport Licensing Act, 1931, except in the case of one route, Dunedin-Waipori, on which buses run for only four months in the year and which is the subject of a "seasonal" license under s. 29 (b). Neither of these licenses authorized the Corporation to carry on any passenger service of the kind shown by the facts proved on the informations. The Corporation claims that it can carry on such a passenger service without a license. It contends that it does not even require a temporary license under s. 29 (c) for the reason that, by virtue of s. 21 (b) of the Act, it was exempted from the necessity of obtaining any passenger-service license for a journey of the kind in question.

Section 21 (b) is as follows :—

A passenger-service license shall not be required in the case of— . . .

(b) The carriage by a contract vehicle of a private party on a special occasion :

5 Provided that this exemption shall not apply in any case where the owner of the contract vehicle or any other person in charge thereof for the time being advertises or in any other way holds himself out as willing to contract for the hiring-out of such vehicle for the purpose of carrying persons to any destination, directly or indirectly named by him.

10 At the hearing before the Magistrate, the prosecution admitted that the facts justified the conclusion that in each case the vehicle was a contract vehicle and that the party carried was a private party. The question in dispute was whether the occasion was
15 “a special occasion.” That is the sole question which is now before this Court.

Our statutory provisions are not the same as those which apply in England and Scotland. Section 61 (1) of the Road Traffic Act, 1930 (Eng.), divides public-service vehicles into three classes—
20 viz., stage carriages, express carriages, and contract carriages. There is a proviso to the definition of contract carriages which enacts that a motor-vehicle adapted to carry less than eight passengers shall not be deemed to be a stage carriage or an express carriage by reason only that “on occasions of race meetings,
25 public gatherings, and other like special occasions it is used to carry passengers at separate fares. Section 61 (2) excludes from the class of express carriages a vehicle which would otherwise fall within it if the vehicle is being “used on a special occasion “for the conveyance of a private party.” The specific statutory
30 conditions upon which a vehicle shall be deemed to be so used were subsequently laid down by s. 25 of the Road Traffic Act, 1934, which came into force on December 1, 1934. (See s. 42 (3) of the Road Traffic Act, 1934, and 1934 *Statutory Rules and Orders*, 180, 181.) Before the enactment of s. 25, the law
35 established in England was that the words “special occasion” in subs. 2 of s. 61 had the same meaning as they bore in subs. 1. They were held to refer to race meetings and public gatherings of that kind; they did not refer to the views and intentions of the private party. They did not therefore include a trip to the sea-
40 side by a private party even at intervals of one year: *Miller v. Pill*(1). Nor did they include regularly held public gatherings such as a regular weekly market or a regular cattle market held two or three times a month: *Pill v. Furse and Pill v. J. Mutton and Son*(2). Nor did they include public illuminations which

(1) [1933] 2 K.B. 308.

(2) [1933] 2 K.B. 308.

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lasted a long time, for the reason that a race meeting or like public gathering would not so continue. Therefore the illuminations at Blackpool which continued for forty-nine days were held not to constitute a "special occasion." This was decided in *Nelson v. Blackford*(3), with reference to an offence charged as occurring after s. 25 of the Road Traffic Act, 1934, had come into force, but that section was not brought to the notice of the Court and the case was decided on s. 61 of the Road Traffic Act, 1930. 5

In Scotland, the words "special occasion" in subs. 2 have not been held to have the same meaning as the same words in subs. 1, but the point does not appear to have been raised. In *M'Dougall and Carruthers v. Paterson*(4) it was not disputed, and the Court did not doubt that the Blackpool illuminations did constitute a "special occasion." In *Macmillan v. Western S.M.T. Co., Ltd.*(5), a football match played "away from home" was accepted by the Court in the particular circumstances as a special occasion, but the case really turned on the point that the party was not a private party. 51

These decisions disclose the difficulty of interpreting the words "special occasion" in s. 61 of the Act of 1930. The passing of s. 25 of the Road Traffic Act, 1934, with the intention of making the law more clear and certain, was not surprising. 20

Our legislation makes no reference to a "special occasion" as being like a race meeting or public gathering, and no legislation has been enacted which corresponds to s. 25 of the English Road Traffic Act, 1934. The duty of the Court is to construe our statutory provisions. Two interpretations have been suggested. The first, by the appellant, is that the occasion must be one of public importance of an unusual kind in the locality which is the destination of the party. Mr. *Adams* suggested that it would be such as would impose a strain on the ordinary transport system and so tend to induce private parties to arrange for their carriage by contract vehicles. The second interpretation, submitted by the respondent, is that an occasion is special for the purposes of the Act if it is an unusual occasion for the members of the private party. 25 30 35

The preamble of the Act of 1931 shows that its object is to license and control commercial road transport other than tramways. A failure to obtain the prescribed license involves substantial penalties. See subss. 2 and 3 of s. 20 of the Act of 1931. It is thus important to construe the statute so as to attain the 40

(3) [1936] 2 All E.R. 109.

(4) [1933] S.C. (J) 39.

(5) [1933] S.C. (J.) 51.

- object of the legislation without preventing a person desirous of observing the law from knowing before he carries a private party in a contract vehicle whether the occasion is a "special occasion" or not. Each interpretation which has been submitted involves
- 5 difficulties. On the appellant's view, it may be asked how an intending contractor may know whether the occasion is regarded as unusual in the particular locality or whether it imposes a strain on the ordinary transport system or not, or whether, on evidence subsequently brought, a Magistrate would take the same view.
- 10 On the respondent's view, it may be asked whether an intending contractor must set himself up as a tribunal to inquire and determine whether the occasion is unusual for each member of the party and whether the contractor is expected to take the risk of a Magistrate subsequently deciding otherwise as to the state of the views and
- 15 intentions and versions of past experiences of the members of the party. Is he to be expected to decide whether the duration of a particular trip would exclude it from the category of an "occasion" or whether an occasion is "special" if it is unusual for some members of the party though not for all, and, if so, for how
- 20 many must it be unusual? Apart from these difficulties, could the Legislature have really intended that the enforcement of the law should depend on the voluntary act of the members of the private party in disclosing their views and intentions and in giving versions of previous expeditions to the traffic enforcement officers?
- 25 It is clear that if an objective test of what is "special" is not required, s. 21 (b) will be thrown very widely open and the enforcement of the law rendered impracticable, or practicable for the most part only by the briefing of evidence from the members of the private party, a course requiring, possibly, methods of interrogation not in harmony with the true spirit of the administration of
- 30 a penal law.

The fundamental question which arises is whether the "special occasion" must exist apart from the views and intentions of the members of the private party. On this point, I think it

35 helpful to consider the only other section in which the words are used in the Act.

Paragraph (c) of s. 29 defines a temporary license. Such a license is one for a service to be carried on for a specified period of not more than seven days or a license for any specified special

40 occasion or occasions. The short period for which such a license may be granted or the special occasion or occasions for which it may be granted may be contrasted with the periods of time or the special events recurring at intervals during a year for which a

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continuous license is required, as shown by para. (a) of s. 29. A special occasion or occasions under para. (c) of s. 29 is something different from the special recurring events referred to in para. (a), but the difference lies, I think, in the frequency of occurrence and not in any distinction between an "event" as an objective fact and an "occasion" as something which depends only on the views and intentions of the private party. The events referred to in s. 29 (a) clearly exist objectively, and an occasion is a particular event. In *Funk and Wagnall's Dictionary*, the first meaning of "occasion" is "a particular event, or juncture of events, considered simply as exciting notice or interest; especially an important event or celebration." I think the "special occasion" referred to in s. 29 (c) must have the same quality of objectivity as the "special events" referred to in s. 29 (a). 5 10

This conclusion is supported by reference to the proviso to s. 21 (b). The exemption from the need of a passenger-service license for the carriage by a contract vehicle of a private party on a special occasion does not apply where the owner of the contract vehicle advertises himself as willing to contract for the hiring-out of his vehicle for the purpose of carrying persons to any destination named by him. In my opinion, the naming of a destination by the owner of a contract vehicle who was advertising a trip to that destination would not of itself create a "special occasion," although it might well refer to a place where a "special occasion" existed. If no special occasion existed, then the advertiser might be granted a temporary license for a period not exceeding seven days permitting him to carry persons to the destination named by him. I think also that the objective nature of the "special occasion" is shown by the fact that it may exist both for a private party and for persons who hire a contract vehicle as the result of public advertisement. A "special occasion" is not something which exists only for a private party. In my opinion, the construction which *Humphries, J.*, would have placed on the words "special occasion" in subs. 2 of s. 61 of the English Act of 1930, independently of the occurrence of the words "race meetings and public gatherings" in the preceding subsection, should be applied to the same words as used in our legislation. In *Miller v. Pill*(6) he said: "On the point whether 'the occasion was a 'special occasion' within the proviso to s. 61, 'subs. 2, if I were dealing with that proviso alone, I should come to the conclusion that the expression 'special occasion' refers to something more than the views and intentions of the members 15 20 25 30 35 40

"of the party and points to something which can be described
 "as a special occasion in the locality and was the object of the
 "journey being undertaken"(7).

- Mr. *Haggitt* submits that this interpretation is itself so vague
 5 that a contractor for a private party would not know whether he
 was breaking the law or not. He urges that if the private party
 is not within the exemption of s. 21 (b), penalties are incurred,
 and that the Court should, if the section is reasonably capable of
 two constructions, give it the more lenient construction which
 10 avoids the imposition of a penalty, and he cites in support
Remington v. Larchin(8). But the alternative view submitted
 by Mr. *Haggitt* implies that the "special occasion" can be created
 solely by the views and intentions of the members of the private
 party, and, assuming that the legislation is of a character which
 15 permits the application of the rule suggested, I think that the
 tenor of the statutory provisions, as they now exist, is sufficiently
 opposed to that construction to prevent its adoption.

- The construction adopted in this judgment may provide a
 sufficient test for the administration of the law. A special
 20 occasion must be one of some public note or importance in the
 locality and it must not be of frequent occurrence. In applying
 this test, the Court should adopt, I think, the view of the ordinary
 reasonable man. A representative football match, for example,
 might be a special occasion, but not an ordinary game of club
 25 football. If the test so applied is not sufficient for the proper
 administration of the law or renders the scope of the exemption
 too narrow to meet the proper convenience of the public, the
 remedy must lie in the hands of the Legislature, which may enact
 the provisions of s. 25 of the Road Traffic Act, 1934 (Eng.), or
 30 similar or other provisions as it thinks fit.

- Applying the law to the facts of the present appeals, I think
 in *Archer's* case that the ordinary reasonable man would not say
 that the visit of certain members of the City Lodges of Oddfellows
 to the Lady Lodge in Kaitangata was an occasion of some public
 35 note or importance in the locality of Kaitangata, even though
 such visits were infrequent. The evidence does not go as far
 as that. Mr. Penny said: "It was a special occasion both for
 "us visiting and for the Kaitangata people who were receiving us."
 I think the appeal must be allowed.

- 40 In *Scott's* case, it may be doubted whether a tour of fifteen
 days was an "occasion" at all, but apart from that consideration
 I do not think that the ordinary reasonable man would say that the

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(7) *Ibid.*, 318.

(8) [1921] 3 K.B. 404.

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visit of a party of young people confined to the Boys' and Girls' Bible Classes of a particular Church to another Church gathering in Nelson was an occasion of some public note or importance in the locality of Nelson even though it was the only one of that kind that had ever taken place. The evidence is simply that the visit was special to the party which went, and that it was a great thing for the Nelson Church people to have the Dunedin people visiting them and taking part in their services. I think the appeal must be allowed. 5

The informations are accordingly remitted to the Magistrates' Court to be further dealt with in accordance with the effect of this judgment. The respondent will pay the appellant £10 10s. costs. 10

Appeals allowed.

Solicitors for the appellant : *F. B. Adams* (Dunedin).

Solicitors for the respondent : *Ramsay and Haggitt* (Dunedin).

TAKAPUNA BOROUGH
DEFENDANT

AND

PUBLIC TRUSTEE
PLAINTIFF.

APPELLANT

RESPONDENT

FULL COURT.
WELLINGTON

1939.

Oct. 2.

MYERS, C.J.
OSTLER, J.
JOHNSTON, J.
FAIR, J.

Rating—Rates and Rate-book—Concession of Half-rates where Dwellinghouse "remains actually vacant and unoccupied" for specified Period—Application where Ratepayer deliberately refrained from Letting when House could have been Let—Rating Act, 1925, s. 69.

Section 69 of the Rating Act, 1925, applies where a dwellinghouse or other building "remains actually vacant and unoccupied" for the requisite period, whatever the ratepayer's intentions may have been and whether or not he deliberately and for his own purposes refrained from letting when the same could have been let.

CASE STATED on an appeal on a matter of law from the decision of the Magistrates' Court sitting at Auckland.

According to the statement of claim, the Public Trustee was mortgagee in possession of a certain piece of land with a dwelling-
5 house erected thereon situate in Ocean View Road, Takapuna. The dwellinghouse had been vacant and unoccupied for a period of not less than six months, the tenant thereof having vacated on June 25, 1938. Notice in accordance with s. 69 (b) of the Rating Act, 1925, was given to the defendant by the plaintiff on
10 January 5, 1939. On July 13, 1938, the rates in respect of the said land for the year ending March 31, 1939, and amounting to £21 17s., were paid by the plaintiff. On January 5, 1939, application in accordance with the provisions in that behalf contained in s. 69 of the Rating Act, 1925, was made by the plaintiff for a
15 refund of £10 18s. 6d., being half the amount of rates paid by

RATING ACT, 1925, s. 69.—In every case where—

(a) Any dwellinghouse or other building remains actually vacant and unoccupied for a period of not less than six months in any rating-year, whether continuously or not; and

(b) The person rated in respect thereof gives to the local authority, within fourteen days after the expiration of such period, notice in writing

of the dates on which such house or building became vacant and unoccupied, and on which it again became occupied,—

then such person shall be liable to pay only half the amount which would otherwise be payable for the year's rates in respect of such dwellinghouse or other building, and shall be entitled to a refund of whatever sum he may have paid in excess of such half.

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him. The defendant had refused to make such refund, and the plaintiff sought to recover that sum from the defendant. It was also proved that the dwellinghouse could have been let at any time during the period that it was not occupied, but in order to facilitate a sale the respondent purposely refrained from letting the same. 5

The action came on for hearing on July 6, 1939, when evidence was given, argument taken, and the decision of the Court was reserved. Upon the hearing the foregoing facts were either admitted or proved before the learned Magistrate. 10

At the hearing counsel for the appellant contended he was entitled to judgment upon the following grounds: (a) That s. 69 of the Rating Act, 1925, upon its proper construction applied only to a case where a ratepayer wishing to let a dwellinghouse or other building was unable to do so; (b) that the said section had no application where a ratepayer deliberately for his own purposes refrained from letting a dwellinghouse or other building when the same could have been let; and (c) that upon the facts as proved or admitted the respondent was accordingly not entitled to the relief provided for in the said section. 15 20

Counsel for the respondent contended as follows: (a) That the said section applied in all cases where a dwellinghouse or other building remained actually vacant and unoccupied for the requisite period, whatever the ratepayer's intentions may have been and whether or not he deliberately and for his own purposes refrained from letting when the same could have been let; and (b) that the respondent was accordingly entitled to judgment. 25

On July 20, 1939, the judgment of the Court was delivered as follows:—

The plaintiff, as executor of the will of Millicent Esther Atkin, was mortgagee in possession of a dwellinghouse which, for a period of twelve months from June 25, 1938, had remained vacant. On July 13, 1938, the plaintiff had paid to the defendant the rates for the year ending March 31, 1939, amounting to £21 17s. Notice in accordance with para. (b) of s. 69 of the Rating Act was given by plaintiff to defendant on January 5, 1939, and an application was then made for a refund of half the amount of rates. The defendant refused to make the refund, and the plaintiff now claims to recover the sum of £10 18s. 6d. 30 35

Immediately prior to June 25, 1938, the dwelling was occupied by a tenant who was requested by the husband of one of the beneficiaries under the will to vacate the premises on the ground that his wife was taking over the house as her share in the estate and wanted to live in it. The tenant had difficulty in finding other accommodation, but after a lapse of two months, during which there were further requests to vacate, found other and less suitable accommodation. When the property became vacant the plaintiff was instructed by one of the two beneficiaries under the will not to let the property until instructions as to selling were received from the other beneficiary who was overseas. This beneficiary consented to a reduction of the purchase-money, but did not actually confirm the instruc- 40 45

tion not to let. The plaintiff, however, wished to sell and refrained from letting. The clerk in charge of the management of this estate admitted in cross-examination that his office had found that places sell fairly readily if untenanted, and that as a rule it is not easy to sell if a tenant is in possession. The evidence of a witness called by the defendant showed that the dwelling could have been let at any time during the period that it remained vacant. It was not difficult for me in these circumstances to find that in order to facilitate a sale the plaintiff purposely refrained from letting the dwelling.

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The question now raised, and I am informed that it is apparently raised for the first time, is whether an owner who deliberately keeps his house vacant for the purpose of selling is entitled under the Rating Act to a refund of half the amount of the rates.

Mr. *Butler* has submitted a very carefully prepared argument, and contends that the intention of the statute was to give relief only to the ratepayer who, wishing to let a dwelling, was unable to do so. If that ratepayer deliberately refrains from letting or shuts up his house for six months, then, it is contended, he is not entitled to relief.

Section 69 of the Act provides:

"In every case where—

"(a) Any dwellinghouse or other building remains actually vacant
"and unoccupied for a period of not less than six months
"in any rating-year, whether continuously or not; and

"(b) The person rated in respect thereof gives to the local authority,
"within fourteen days after the expiration of such period,
"notice in writing of the dates on which such house or building
"became vacant and unoccupied, and on which it again
"became occupied,

"then such person shall be liable to pay only half the amount which would
"otherwise be payable for the year's rates in respect of such dwellinghouse
"or other building, and shall be entitled to a refund of whatever sum he
"may have paid in excess of such half."

Mr. *Butler* contends that the real intention of the Legislature is to be ascertained by reading into para. (a) the words "which is available for

"letting" after the words "or other building."

I agree with Mr. *Butler's* contention that in construing a statute it is necessary to give effect to the intention of the Legislature. This is a fundamental rule of interpretation, but there are other rules to be followed when it becomes necessary to determine by inference what that intention was. It is true that by our Acts Interpretation Act, 1924, it is provided that every Act shall receive "such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning, and spirit." I do not think that this provision gives to a Court the power to do anything more than expound the law as it stands according to the sense of the words that the Legislature has used. If a Court merely suspects that the language used does not express the real intention of the Legislature, it is not permitted to seek to reform that language according to the supposed intention. Where an omission is obvious, that omission may be supplied; but even then there must be adequate grounds to justify the inference that the Legislature intended something that it has omitted to express. To speculate upon what the Legislature would have done had it considered a specific case and to hold that an Act means what a Court thinks should be the law would be to legislate and not to interpret.

Consideration of the language of the Act does not lead me to conclude that the intention of the Legislature was to give relief only to a landlord who had a property available for letting and could not find a tenant. The section of the Act has the same meaning to-day that it had when it first appeared in the Rating Act in 1894. At that time the housing problems of to-day did not exist, neither did the present-day restrictions on the rights

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of the landlord to obtain possession of his house. It is possible, of course, that the Legislature did not contemplate the existence of a state of affairs which make it extremely difficult to sell a dwellinghouse occupied by a tenant, but even if it were thought that at the present day little consideration would be given to the man who deliberately kept his property vacant in order to enhance the prospects of sale, it does not follow that a similar view would have been taken forty-five years ago. Apart from that aspect, let us take the case of an owner whose only asset is a dwelling or an equity in one and who, perhaps against his will, is transferred to some other part of the Dominion where he knows that to rent a dwelling for himself and family may be almost an impossibility. He knows that a dwelling could be purchased, but he is quite unable to purchase until he can sell the dwelling into which he has put all that he had. He thinks that his property will sell for what it cost or perhaps for something less, and instructs his agent to sell. The agent thinks that the property should be sold within a few weeks, but finds eventually that six months have elapsed before a sale is effected. In such circumstances, I think that even to-day it could not be said that the owner was not entitled to as much consideration as another and more affluent owner who was unable to find a tenant for one of his many houses. It seems to me, therefore, that to read into the Act the words suggested might be to limit its meaning in a way that the Legislature did not intend.

I am unable to find in *Mayor, &c., of Dunedin v. Baird*, (1913) 33 N.Z.L.R. 149, 16 G.L.R. 269, anything to support the defendant's contention. His Honour Mr. Justice Williams did, however, at the end of his judgment in that case, say that the words of the section should be confined to their literal meaning, and in *Brewer v. Papatoetoe Town Board*, [1934] N.Z.L.R. 774, G.L.R. 737, His Honour Mr. Justice Fair gave to the words "vacant" and "unoccupied" their natural and ordinary meaning. I am of opinion that I must interpret them in the same way.

The only test supplied by the words of the Act for the purpose of ascertaining whether the statutory exemption from rates exists is that of an actual vacancy. Nothing is said as to the circumstances giving rise to the vacancy. The person claiming the exemption created by para. (a) is required by para. (b) to give notice only of the dates of vacancy and not of the reasons for it. To read into para. (a) the words suggested by counsel would necessitate the reading into para. (b) of some other words.

I am quite unable to find any adequate reason for thinking that the intention of the Legislature is to be ascertained only by adding to the words that it has used. Those words interpreted literally confer a right to some relief from the burden of rates upon all owners of dwellinghouses actually vacant. The cases cited may be considered as authorities for holding that the words must be interpreted literally; but apart from those decisions I am of opinion that the meaning of the words of the statute cannot be limited in the manner suggested.

The Court duly entered judgment for the respondent for the amount claimed, £10 18s. 6d., and costs.

The appellant, having obtained the leave of the Court to appeal, gave notice of appeal against the said decision upon the ground that the said decision was wrong in law.

O'Shea, for the appellant. Section 69 of the Rating Act, 1925, applies only to lettable buildings: in relation to which s. 5 (d) (g) of the Acts Interpretation Act, 1924, may be considered.

The question now under consideration did not come before *Williams, J.*, in *Dunedin City Corporation v. Baird*(1), or before *Fair, J.*, in *Brewer v. Papatoetoe Town Board*(2).

(1) (1913) 33 N.Z.L.R. 149; 16 G.L.R. 269. (2) [1934] N.Z.L.R. 774; G.L.R. 737.

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The learned Magistrate says the statute is silent as to the circumstances giving rise to the vacancy ; and that "the intention of the Legislature is to be ascertained only by adding to the words that it has used." That is not admitted or contended by the appellant, who says that the Act can be paraphrased by the use of additional words to show what was meant. In *Dunedin City Corporation v. Baird*(3), the learned Judge refers only to vacancies that the landlord cannot prevent ; and he refers to a landlord who is suffering from the misfortune of not being able to get a tenant. A property is in the beneficial occupation of an owner when he holds it without a tenant for the purpose of sale, just as much as if he were conducting building alterations. The learned Judge goes on to say "If one ratepayer is relieved from payment of rates the burden of his rates is placed upon the other ratepayers"(4), and this is one of the dominating factors in relation to exemptions which appear in *Inland Revenue Commissioners v. Forrest*(5). Relief is given not to a person who is acquiring gain or a more advantageous position, but to a person who is suffering a pecuniary loss. The respondent has suffered no pecuniary loss. The owner, who refuses to let property so that he can more readily sell, balances the value of not letting against letting. He thinks it pays him better not to let, and he refuses to let. There is nothing from which he should be relieved, and there is no reason why the general mass of ratepayers should assist him further.

Baird's case was mentioned and discussed by *Blair, J.*, in *Mayor, &c., of Auckland v. Hawthorne*(6), where the correct interpretation of the section is given.

A house is not lettable unless it can be let : see 6 *Oxford English Dictionary*, Part I, 218. In view of the definitions, a house can be considered as lettable where the only person having power to let refuses to let it. Exemptions must be construed strictly : see *Brown on Rating*, 2nd Ed. 320. *Brewer v. Papatoetoe Town Board*(7) was the exact opposite of the case now under consideration. A literal interpretation of s. 69, if interpreted to apply whenever a house is vacant for any reason whatever, leads to very absurd and mischievous results ; and see *Hunterville Town District v. Hyde*(8), which shows that, unless a person can bring himself within the widest literal interpretation of the exemption,

(3) (1913) 33 N.Z.L.R. 149, 151 ;
16 G.L.R. 269.

(4) *Ibid.*, 153 ; 270.

(5) (1890) 15 App. Cas. 334, 340.

(6) [1929] G.L.R. 101, 102.

(7) [1934] N.Z.L.R. 774, 776 ;

G.L.R. 737, 738.

(8) [1933] G.L.R. 768, 770.

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he cannot possibly succeed. There, it was a question of exclusion ; and the question here is a question of inclusion.

The beneficial occupation in the case under consideration is that the property is held with a view to having it sold. The finding of the Magistrate is conclusive on that point. The real question is : Was it ever intended that an owner should hold property without a tenant merely for the purposes of sale and at the same time get this exemption ? The Act must be considered in relation to all the existing circumstances, and relief should not be given to persons in respect of an act whereby they are already deriving a pecuniary advantage : see *31 Halsbury's Laws of England*, 2nd Ed. 506, para. 653 ; *Maxwell on the Interpretation of Statutes*, 7th Ed. 46 ; *Gildart v. Gladstone*(9) ; *Hill v. East and West India Dock Company*(10) ; and *Tozer v. Viola*(11).

J. H. Carrad, for the respondent, was not called on.

MYERS, C.J. (orally). I agree with the Magistrate's judgment(1), and substantially with his reasoning. The appeal seems to me to be a hopeless one. Section 69 of the Rating Act, 1925, gives a concession of half the rates to a ratepayer in a certain event. This is the event : In every case where any dwellinghouse or other building "remains *actually* vacant and "unoccupied" for a period of not less than six months in any rating-year, whether continuously or not, and the ratepayer gives notice pursuant to para. (b) of the section, he is entitled to the rebate. The present case comes within the very words of the section. The dwellinghouse in respect of which the concession is claimed remained actually vacant and unoccupied for a period of not less than six months in the rating-year. The words of the section are, to my mind, perfectly plain, and effect could not be given to Mr. *O'Shea's* contention without recasting the section and adding words of qualification or condition which the Legislature has not chosen to include.

In my opinion, the appeal should be dismissed.

OSTLER, J. (orally). I agree with the decision of the learned Magistrate for the reasons exactly which were stated by him. They are stated so clearly that I do not think it is necessary to add anything further.

(9) (1810) 11 East 675, 685 ; 103 E.R. 1167, 1170, 1171. (11) [1918] 1 Ch. 75, 80.

(10) (1884) 9 App. Cas. 448, 454-56, 458, 459.

(1) *Ante*, p. 186, l. 30.

JOHNSTON, J. (orally). I agree with the judgments delivered.

FAIR, J. (orally). I agree that the appeal should be dismissed and have nothing to add to the judgments that have been given.

Appeal dismissed.

Solicitors for the appellant: *McGregor, Lowrie, Butler, and White* (Auckland).

Solicitor for the respondent: *The District Solicitor*, Public Trust Office (Auckland).

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Feb. 14, 26.

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EASSON v. WELLINGTON CITY CORPORATION.

Practice—Trial—Special Jury—Two Actions with substantially similar Facts—Special Jury ordered in each Action—Whether Judge has power to order such Actions to be tried together with both Juries sitting together—Juries Act, 1908, s. 71 (3)—Code of Civil Procedure, RR. 210–12.

The Court has no jurisdiction under s. 71 (3) of the Juries Act, 1908, to make an order against the will of the plaintiffs requiring a special jury in one case to sit with a special jury in another case, though the facts are substantially common to both actions.

Bray v. Doubleday (No. 1)(1) distinguished.

(1) (1886) N.Z.L.R. 5 S.C. 30.

TWO SUMMONSES, one in each action, for an order that each action should be tried together with the other.

Two employees of the defendant Corporation were sent to work in an electric substation in Nathan's Building, Wellington.

- 5 One of them, Easson, had a license to work in the defendant Corporation's workshops, and this license appeared in the Register of Electric Wiremen's Limited Registration. The other, Butcher, was sent to act as a labourer assisting Easson. While these two men were employed in the electric substation, an explosion
- 10 or short-circuit occurred. Both workmen were injured, and Easson subsequently died from his injuries. Butcher claimed damages in a writ issued by him for bodily injuries on account of the negligence of the Corporation. Easson's widow had issued a separate writ on behalf of herself and her infant child,
- 15 aged eleven years, claiming damages on account of the negligence of the Corporation for the pecuniary loss which she alleged they had suffered.

Upon summonses issued in each action, the defendant Corporation asked for a special jury in each case upon the ground that

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difficult questions relating to scientific and technical matters were likely to arise, thus invoking the powers of the Court under the recently passed amendment to the Juries Act, 1908, contained in ss. 37 and 38 of the Statutes Amendment Act, 1939.

It appeared to *Smith*, J., that one question common to both actions was whether it was safe for the men to be sent into the substation though the electric current was not turned off. In His Honour's view, that was a question which could not be answered without a knowledge of the layout of the substation, of the danger-points, the safeguards, and the way in which the current might be expected to act in relation to the work being done. In other words, only an electrical engineer or persons who were advised by such an expert on technical matters of difficulty could properly determine whether it was safe to send these two men into the substation while the current continued to flow. His Honour, therefore, gave judgment, ordering a special jury in each case. At the conclusion of that judgment, which was an oral one, Mr. *O'Shea* said he proposed to ask the Court to order both actions to be tried together, but His Honour indicated that that matter would require separate argument. The present summonses had accordingly been issued.

O'Shea and *Marshall*, in support.

O. C. Mazengarb, to oppose.

Cur. adv. vult.

SMITH, J. The application is novel, and it is desirable to state the facts. [His Honour then stated the facts as above, and indicated his previous oral judgment. He proceeded :] Mr. *O'Shea* is relying, not on any rule of the Code of Civil Procedure, but upon s. 71 of the Juries Act, 1908, which provides by subs. 3 that the Court or a Judge may at any time order that the trial be had by a special jury upon such terms as the Court or Judge thinks fit. Lest the Court should be regarded as *functus officio* under s. 71, he did not seal the orders for a special jury in each case, and he now asks the Court to treat the present summonses as supplementary to the previous summonses for a special jury and that any order made upon the present applications should be embodied in the order for the special jury in each action when it is drawn up. Mr. *Mazengarb* submits that, as the order for a special jury has not been sealed, the present application is premature, or, alternatively, that there is an order for a special jury, and that the Court is *functus officio*. On this point, I think that, as the

orders for a special jury have not been sealed and no one has been prejudiced, there is no formal reason why the Court should not, in the circumstances of the present application, supplement the order for a special jury in each case by directing that the actions shall be tried together, if the Court has the power so to do and thinks fit to exercise it.

Mr. O'Shea admits that he must rely solely on s. 71 of the Juries Act, 1908, and that, if the present actions were being tried before common juries, he could not ask that they should be tried together. Such a result must, of itself, make the Court proceed with caution.

Mr. O'Shea's argument, briefly stated, is that s. 73 of the Juries Act, 1880, gave the Judge the same power as is conferred upon a Judge by s. 71 (3) of the present Act of 1908. Under that power, in *Bray v. Doubleday (No. 1)*(1), *Johnston, J.*, granted a special jury upon the terms that one of three actions between the same parties was to be tried before the other two, notwithstanding R. 247 then in force, which required, as does the present R. 251, that actions set down for trial at the same sittings shall be tried in the order in which the writs of summons in such actions were issued. He argues, therefore, that, although RR. 210-12 of the Code concerning the consolidation of actions could not cover the present cases, the Court may act under the powers conferred by s. 71 (3) of the Juries Act, 1908, and require the actions to be tried together. He invites the Court to apply the maxim *Boni judicis est ampliare jurisdictionem* and calls in aid, by way of illustration, the much wider provisions of O. 49, r. 8, of the Rules of the Supreme Court in England and the decisions upon that rule, which show that the Court in recent years has tended to take a liberal view of the circumstances in which actions should be consolidated. I have considered all these matters, but I am of opinion that the orders sought should not be made.

The order sought by the defendant Corporation is that the special juries ordered in each case shall be ordered to sit together in the one Court and listen to the evidence in both cases. Each jury would then be addressed, on the facts relevant to the case it was empanelled to try, by the counsel engaged in that case, and the trial Judge would then, no doubt, sum up separately to each jury.

The Code contains specific rules (RR. 210-12) showing the kind of consolidation of actions contemplated by our Code of Civil Procedure. By those rules, which are for the benefit of defendants,

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where several actions are brought by the same plaintiff against several defendants—*e.g.*, upon the same policy of insurance—the Court may, upon the application of the defendants, order a stay of proceedings in all the actions but one (whichever the plaintiff elects), until such one is determined, the defendants undertaking to be bound by the verdict in such action. If a verdict is found for the plaintiff, the defendants are all bound; but if it is found for the defendant, the plaintiff may proceed in the other actions. The procedure contemplated by Mr. O'Shea is so essentially different from this, that I do not think the Court should hold that it has power under s. 71 (3) to make an order, against the will of the plaintiffs, requiring a special jury in one case to sit with a special jury in another case, though the facts are substantially common to both actions. The proposed procedure would establish a different kind of consolidation in no way justified by the analogy of taking power merely to alter the order for hearing cases as in *Bray v. Doubleday*(2). In my view, some specific rule authorizing and regulating such a procedure should be made before the Court holds that it has power to impose it upon a party against his will. 5 10 15

However this may be, I am satisfied that if the Court had power, the Court's discretion should not be exercised in the present cases. It is true that Easson and Butcher were employed by the same defendant, and were working together in the same place, and that their injuries arose out of the same occurrence. But the claims differ in important respects. Butcher is suing personally, and there is no plea of contributory negligence against him. Mrs. Easson is suing for herself and her infant daughter under the Deaths by Accidents Compensation Act for the loss of pecuniary benefit. In her action, contributory negligence is alleged against Easson. Plainly it would be to the advantage of Butcher, the labourer, to throw any blame on Easson, the licensed worker who, as the servant of the Corporation, might render the Corporation liable to Butcher. I do not think that the plaintiff in Easson's case should be obliged to submit to that from the mouth of another plaintiff. If both actions were tried together, one counsel could not appear for both plaintiffs, and on this application the Court must assume that each plaintiff would be separately represented. If counsel for the plaintiffs made conflicting submissions as to the admissibility of evidence, the rights of each plaintiff would, in my view, be prejudiced. Again, it would be unfair, I think, to the plaintiff, Butcher, that his case should be complicated by the plea of contributory negligence against Easson, or by the special 20 25 30 35 40

- directions which would be necessary in Easson's case that the only amount recoverable was the loss of pecuniary benefit. Furthermore, certain defences raised in Easson's case are not raised in Butcher's. The legal defences are, of course, for the
- 5 Judge; but the plea of *Volenti non fit injuria* raises questions of fact which are not raised against Butcher, and Butcher's case should not be complicated by the discussion of them. The evidence in Easson's case may be substantially longer than in Butcher's, and Butcher should not be subjected to such delay.
- 10 Delay would also raise questions of costs which would not, I think, be susceptible of ready and fair adjustment.

- The procedure proposed is entirely novel. I doubt if it would in fact save expense; and I entertain no doubt that even if the Court had the power to make the order now asked for, it ought not
- 15 in the exercise of its discretion to make it. Each summons is accordingly dismissed, with costs, £2 2s., in each case.

The order for the special jury in the two previous applications stands as made.

Summons dismissed.

Solicitors for the plaintiffs: *Mazengarb, Hay, and Macalister* (Wellington).

Solicitor for the defendant: *J. O'Shea*, City Solicitor (Wellington).

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HENDERSON TOWN BOARD v. JOHNSTON AND OTHERS.

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Nov. 27, 29 ;
Dec. 19.

SMITH, J.
FAIR, J.
CALLAN, J.

Mortgagors and Tenants Relief—Mortgages—Application for Adjustment of Liabilities of Purchaser under Agreement for Sale of Land—Order of Court of Review remitting Rates in arrear and Penalties for Benefit of both Vendor and Purchaser—Whether Court of Review had Jurisdiction to relieve Vendor from Rates—"Not inconsistent with this Act"—Mortgagors and Lessees Rehabilitation Act, 1936, ss. 4 (1), 7, 10 (1), 27 (3), 41 (1) (d), 42 (3), 46, 48, 49, 71—Rating Act, 1925, s. 70.

The words "not inconsistent with this Act" in s. 71 of the Mortgagors and Lessees Rehabilitation Act, 1936, must have a wide interpretation.

Where a matter is properly before the Court of Review as being within the scope, purpose, and intention of the Act, and that Court does what it deems just and equitable in the circumstances, and, in so doing, observes the principles of natural justice, the Supreme Court cannot say that such a determination is beyond the jurisdiction of the Court of Review.

S., the owner of land within the rating district of the plaintiff Board, agreed on September 6, 1935, to sell the land to E., under an agreement by which S. was liable for the arrears of rates then due, and E. agreed to undertake the liability for rates thereafter. S.'s name remained in the rate-book as the occupier of the land until March 19, 1937, when E. was entered in the book as the occupier. By that time the rates amounted with penalties to £117 8s. 6d. On July 17, 1937, the plaintiff Board recovered judgment against S. for these rates and costs.

E.'s application on January 26, 1937, for the adjustment of his liabilities under the provisions of the said Act came before an Adjustment Commission, whose order was appealed from by the plaintiff Board. The Court of Review made a minute in the following terms:—

"Order that applicant be entitled to retain possession up to May 31, 1939, on paying to his vendor the sum of 15s. per week. Vendor
"to pay rates from April 1, 1937. Penalties on rates and rates in
"arrear at April 1, 1937, remitted. Applicant to give up possession
"to his vendor on or before May 31, 1939."

This order was drawn up and sealed, but there was no dispute that it meant (a) that E. was a farmer applicant; (b) that E. was not entitled to retain the property, and that it would revert to S. on or before May 31, 1939; (c) that, during the retention of the property by E., he should pay to S. 15s. per week; (d) that all rates in arrear at April 1, 1937, including penalties, were remitted, and that this remission was to ensure for the benefit of both S. and E., and was intended to have the effect of discharging the statutory charge created upon the making of each rate until its payment; and (e) that S. should pay the rates on the land from April 1, 1937.

On a motion for writ of certiorari, to which the plaintiff sought to add a claim for a writ of prohibition,

Held, by a Full Court (Smith, Fair, and Callan, JJ.), dismissing the motion, That the Court of Review had jurisdiction to make the order, which was "not inconsistent with the Act."

MOTION for writ of certiorari to quash an order of the Court of Review on the ground that it was made without jurisdiction. During the course of the hearing, Mr. *Leary*, for the applicant, asked leave to amend the proceedings by adding a claim for a writ of prohibition. The Court reserved its decision on the point.

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The motion originally came before *Callan*, J., but he, considering that the actions of the Court of Review presided over by a Judge of the Supreme Court were in question, thought that the motion should be heard by a Full Court.

The facts in outline are that for some years prior to September, 1935, the defendant, Smyth, was the owner of some 22 acres of land within the Rating District of the Henderson Town Board. On September 6, 1935, he agreed to sell the land to the defendant, Edwards. The Court was informed by counsel that under this agreement Smyth was made liable for the arrears of rates then due, amounting to about £37, and that Edwards agreed to undertake the liability for rates thereafter. Smyth's name remained in the rate-book as the occupier of the land until March 19, 1937, when Edwards was entered in the book as the occupier. By that time, the rates in arrear, including those owing at the date of the agreement for sale and purchase, amounted, with penalties, to £117 8s. 6d. On July 12, 1937, the plaintiff, the Henderson Town Board, recovered judgment against Smyth for the amount of these rates and costs—*viz.*, £121 0s. 6d.

After Edwards became the occupier, he made an application, on January 26, 1937, for the adjustment of his liabilities under the provisions of the Mortgagors and Lessees Rehabilitation Act, 1936. At this time, Smyth's name was still entered in the rate-book as occupier. By virtue of s. 7 of the Act of 1936, the agreement for sale and purchase was deemed to be a mortgage of land to secure payment of the unpaid purchase-money and interest thereon and the fulfilment of the conditions set forth in the agreement. One of the conditions was the liability to pay rates from the date specified in the agreement. Consequentially, for the purposes of the Act, "the vendor" was "the mortgagee" and "the purchaser" "the mortgagor." By definition (s. 4 (1)) the agreement was an adjustable security.

The application for relief came before the Auckland Rural Adjustment Commission on August 24, 1937. The Commission heard counsel for the applicant and counsel for the defendant, Smyth, but not counsel for the plaintiff, the Henderson Town Board. *Inter alia*, the Commission determined that Edwards

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was a farmer applicant and that he was entitled to retain the property. The Commission made certain orders, including an order for the payment of arrears of rates by instalments subject to the remission of penalties. The Henderson Town Board, being dissatisfied with this decision, appealed to the Court of Review. In respect of this appeal, the Adjustment Commission reported to the Court of Review that a feature of the application was the burden of rates being carried by the property. The Court of Review heard counsel for both defendants and also counsel for the Henderson Town Board on October 20 and 21, 1938. The Court's powers included the power to make any order which an Adjustment Commission could make. The Court embodied its judgment in a minute in the following terms :—

Order that applicant be entitled to retain possession up to May 31, 1939, on paying to his vendor the sum of 15s. per week. Vendor to pay rates from April 1, 1937. Penalties on rates and rates in arrear at April 1, 1937, remitted. Applicant to give up possession to his vendor on or before May 31, 1939.

This order had not been drawn up and sealed, but there was no dispute that it meant (a) that the applicant, Edwards, was a farmer applicant ; (b) that the Court determined that Edwards was not entitled to retain the property, and that it should revert to Smyth on or before May 31, 1939 ; (c) that during the retention of the property by Edwards, he should pay to Smyth the sum of 15s. per week ; (d) that all rates in arrear at April 1, 1937, including penalties, were remitted, and that this remission was to enure for the benefit of both Smyth and Edwards and was intended to have the effect of discharging the statutory charge created upon the making of each rate until its payment ; (e) that Smyth should pay the rates on the land from April 1, 1937.

Leary, for the plaintiff.

Matthews, for the defendant, Edwards.

Goodall and *A. C. Stevens*, for the defendant, Smyth.

Matthews, for the defendant, Edwards, informed the Court that he had received a memorandum from the Court of Review that it did not propose to be represented in the proceedings.

Leary, for the plaintiff. The Court of Review made part of its order varying the order of the Adjustment Commission made outside its jurisdiction. Rates have been cancelled instead of having the basic value applied to their payment. The question of acquiescence and delay does not arise as the error of jurisdiction is one which appears on the face of the proceedings.

The decision to wipe out rates, at the same time allowing a basic value in excess thereof, is erroneous in law, because the governing section in the Mortgagors and Lessees Rehabilitation Act, 1936, prescribes that charges are to be applied in order of 5 priority, and rates are a first charge. The error of law here amounts to an excess of jurisdiction. The Court of Review is an inferior Court, and certiorari lies to quash such excess. It lies against the order as opposed to the perfected order. Rates are a statutory or other charge, and within the heading of "adjustable 10 "security" and "adjustable charge" as defined by s. 4 of the statute: *The King v. Mayor, &c., of Inglewood*(1). The principle of *inclusio unius exclusio alterius* applies to s. 38 (3), and see also s. 42 (5); its plain language has been generally accepted by the legal profession.

- 15 [*Goodall*, for the defendant, refers to s. 5 of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937.]

The Amendment Act still leaves sacrosanct any rates that can be supported by a basic value. Local authorities budget for their rates upon the footing that those rates will be paid. To wipe 20 them out arbitrarily is to throw upon the neighbours of the applicant the burden of making it up: ss. 38 (3), 42 (5), and 5 (1) (2) of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937; Statutes Amendment Act, 1939, s. 49 (1); and see, in particular, ss. 27 (3) and 71 (1) of the Mortgagors and Tenants 25 Rehabilitation Act, 1936 ("not inconsistent with this Act").

As to excess of jurisdiction: (a) If the order is such that it cannot under any circumstances be made, the making of it is an excess of jurisdiction. (b) If the order is such that it can under some circumstances be made, the making of it erroneously is not 30 an excess of jurisdiction. (c) This reasoning applies to part of an order: *South Eastern Railway Co. v. Railway Commissioners*(2); *The King v. Rockhampton Justices, Ex parte Petersen*(3); *Duthie v. McGibbon*(4); *R. v. Minister of Health, Ex parte Committee of Visitors of Glamorgan County Mental Hospital*(5); *In re Otago 35 Clerical Workers' Award*(6); and *Farquharson v. Morgan* (7). Certiorari admittedly is discretionary where the error does not appear on the face of the proceedings; it is not discretionary when it does lie on the face of the proceedings: *Clancy v. Butchers'*

(1) [1931] N.Z.L.R. 177; G.L.R. 63. (5) [1938] 4 All E.R. 32, 38.
 (2) (1881) 6 Q.B.D. 586, 599. (6) [1937] N.Z.L.R. 578; G.L.R.
 (3) [1903] St.R.Qd. 73. 388.
 (4) (1891) 10 N.Z.L.R. 514, 517. (7) [1894] 1 Q.B. 552, 556, 563.

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Shop Employees' Union(8); *Blackball Miners v. Judge of the Court of Arbitration*(9); *New Zealand Waterside Workers' Federation Industrial Association of Workers v. Fraser*(10); *In re Pike, Ex parte Richards*(11); and *Cornford v. Greenwood*(12).

Matthews, for the defendant, Edwards : An agreement for sale and purchase is under notice. The Court would still have had to deal with the real mortgagee, too. This is entirely a new order. The rates would actually go because they would become an adjustable debt : see the correspondence between the Commission and the Town Board. The Board's own correspondence shows that they regarded the rates as owing by Edwards. There was no need to fix the basic value of the land. The Court of Review was to be the final Court of appeal in these matters ; that was for the purpose of covering defects. Section 27 (3) of the principal Act contains very strong powers. The Court had power to make this particular order, and it fixed the basic value as nil : see s. 39 (1), (2). Even if the order as made was erroneous and did exceed jurisdiction, it was not a manifest excess, but one which could only be ascertained by microscopic examination : see *9 Halsbury's Laws of England*, 2nd Ed. 862, 878, 880, 881, 888, paras. 1458, 1484, 1485, 1493 ; *16 English and Empire Digest*, 417-20, 460-62, paras. 2763-2800, 3345, 3346, 3357, 3363 ; *Cornford v. Greenwood*(13) ; *New Zealand Waterside Workers' Federation v. Fraser*(14) ; *The Queen v. Sheward*(15) ; and *R. v. Glamorgan Appeal Tribunal, Ex parte Fricker*(16). This is a very strong case of estoppel and acquiescence : s. 55. The Town Board treated the proceedings as at an end : s. 58. The point that the order is unsealed is not in issue. The order has been carried out by all parties, including the present plaintiffs : *Reynolds v. Attorney-General*(17) and *Boyes v. Carlyon*(18).

Leary, for the plaintiff, adds one matter arising from the effect of s. 48. When the property was handed back by Edwards to Smyth, the liability for rates still continued and the Court has no jurisdiction to adjust Smyth's liability, because he was no party

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| (8) (1904) 1 C.L.R. 181, 196. | (13) [1938] N.Z.L.R. 291 ; G.L.R. 163. |
| (9) (1908) 27 N.Z.L.R. 905 ; 10 G.L.R. 633. | (14) [1924] N.Z.L.R. 689, 701, 702 ; G.L.R. 139, 147, 148. |
| (10) [1924] N.Z.L.R. 689, 702, 709 ; G.L.R. 139, 148, 151. | (15) (1880) 9 Q.B.D. 741. |
| (11) [1937] N.Z.L.R. 481, 485 ; G.L.R. 302, 303. | (16) (1917) 115 L.T. 930, 932. |
| (12) [1938] N.Z.L.R. 291, 296 ; G.L.R. 163, 166. | (17) (1909) 29 N.Z.L.R. 24 ; 12 G.L.R. 309. |
| | (18) [1939] N.Z.L.R. 504 ; G.L.R. 309. |

to the application. Smyth never was an applicant under the Act : s. 29. It must be conceded that the order had the immediate effect of wiping Edwards out of the proceedings.

[Goodall agreed that Edwards was released.]

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- 5 Three effects of the application of s. 48 are : (a) that Edwards is let out ; (b) that s. 68 does not apply, because it does not apply to a third person ; and (c) that the error is an error on the face of the Court's minute : see s. 9 of the 1937 Amendment Act. But Smyth was not a guarantor. In any event, the guarantor does
- 10 not carry liability for rates direct. An owner who has sold under an agreement for sale and purchase should have applied if he had had a right to apply : s. 29 (5). Edwards bought in September, 1935, and was not on the rate-roll until March, 1937. Smyth had never had himself taken off the roll.
- 15 [The Court here granted Mr. Matthews leave to withdraw from the proceedings.]

Goodall, for the defendant, Smyth. As to jurisdiction, see *Short and Mellor on Crown Practice*, 2nd Ed. 47, and 47 *Law Quarterly Review*, 386, 557 ; *In re Pike, Ex parte Richards*(19) ;

20 *Cornford v. Greenwood*(20) ; *Priest v. Kinross-White and McCarthy*(21) ; *In re Skene's Award*(22) ; and *R. v. Minister of Health, Ex parte Committee of Visitors of Glamorgan County Mental Hospital*(23). Priorities are a matter of law. As to the effect of unsealed minutes, see *In re A.*(24).

- 25 Defendant's opposition is based on that part of s. 22 which declares that " Proceedings before the Court [of Review] shall not " be held bad for want of form. No appeal shall lie from any " order of the Court, and no proceeding or order shall be liable " to be challenged, reviewed, quashed, or called in question in
- 30 " any Court." The net result of that section was that an order of the Court of Review could be quashed in the Supreme Court only for manifest want of jurisdiction. The present tribunal cannot question the intrinsic merits of the decision, as it can on an appeal, but must confine itself solely to collateral matters or
- 35 those extrinsic to the decision.

Stevens, in support. As to delay and acquiescence, see *The Queen v. Surrey Justices*(25) ; *The Queen v. South Holland*

- (19) [1937] N.Z.L.R. 481, 485 ; (22) (1904) 24 N.Z.L.R. 591, 603 ;
G.L.R. 302, 303. 7 G.L.R. 153, 160.
(20) [1938] N.Z.L.R. 291, 295 ; (23) [1938] 4 All E.R. 32.
G.L.R. 163, 166. (24) [1935] N.Z.L.R. s. 41, s. 42.
(21) (1913) 32 N.Z.L.R. 648, 651 ; (25) (1870) L.R. 5 Q.B. 466.
15 G.L.R. 391, 392.

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Drainage Committee(26); *The Queen v. Sheward*(27); *R. v. Williams, Ex parte Phillips*(28); *R. v. Londonderry Justices*(29); *R. v. Glamorgan Appeal Tribunal, Ex parte Fricker*(30); and *9 Halsbury's Laws of England*, 2nd Ed. 899, n. (b), para. 1515. *Farquharson v. Morgan*(31) is distinguishable.

As to costs, see *In re the Addington Licensing Committee*(32).

Leary, in reply. The present case is distinguishable from those cited, as it deals with a local body attempting to obtain payment of its rates. For the acquiescence doctrine to apply, the party must be legally capable of an effective acquiescence. A local body is incapable of waiving its rates: Rating Act, 1908, ss. 64, 74, 75, 85 (5); and see s. 127 of the Public Revenues Act, 1926; *Mansfield v. Blenheim Borough*(33); *Stourcliffe Estates Co., Ltd. v. Bournemouth Corporation*(34); *R. v. St. Mary Norwich Overseers*(35); *La Banque Jacques-Cartier v. La Banque D'Epargne de la Cité de Montreal*(36); *Kerr v. Preston Corporation*(37); *R. v. Thompson*(38); *The Queen v. Mayor, &c., of Sheffield*(39); *R. v. London County Council, Ex parte Swan and Edgar* (1927), *Ltd.*(40); *Ex parte Mullen, Re Hood*(41); and *The King v. Hibble, Ex parte Broken Hill Proprietary Co., Ltd.*(42).

Cur. adv. vult.

The judgment of the Court was delivered by

SMITH, J. [After stating the facts, as above:] Mr. *Leary*, for the applicant, submits that the order was made by the Court of Review without jurisdiction on the ground that it relieves Smyth from liability for rates; that Smyth was not an applicant for relief within the statute, and, accordingly, that the Court had no jurisdiction to grant him relief. Mr. *Leary* admits that the effect of the order determining that Edwards was not entitled to retain the land was to enable the Court to release Edwards from all liability for rates. This is the result of the operation of ss. 48 and 49 of the Mortgagees and Lessees Rehabilitation Act, 1936. All counsel accept this position, and the Court is satisfied that it

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| (26) (1838) 8 Ad. & E. 429; 112 E.R. 901. | (34) [1910] 2 Ch. 12, 14. |
| (27) (1880) 9 Q.B.D. 741. | (35) (1791) Nolan 28. |
| (28) [1914] 1 K.B. 608, 613, 614. | (36) (1887) 13 App. Cas. 111, 118. |
| (29) [1905] 2 I.R. 318, 322, 323. | (37) (1876) 6 Ch.D. 463, 468. |
| (30) (1917) 115 L.T. 930, 934. | (38) (1843) 5 Q.B. 477, 481; 114 E.R. 1329, 1331. |
| (31) [1894] 1 Q.B. 552. | (39) (1871) L.R. 6 Q.B. 652. |
| (32) (1893) 12 N.Z.L.R. 70, 77. | (40) (1929) 45 T.L.R. 512. |
| (33) [1923] N.Z.L.R. 842, 851, 852; G.L.R. 193, 198, 199. | (41) (1935) 35 N.S.W.S.R. 289, 296. |
| | (42) (1920) 28 C.L.R. 456. |

is correct; but it is desirable to explain the operation of the sections.

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The liability of Edwards for rates existed in three ways. First, under the agreement for sale and purchase he was liable to indemnify his vendor, Smyth, in respect of the rates (other than the £37 due at the date of the agreement for sale and purchase) for which Smyth was primarily liable while he remained the occupier in the rate-book. Secondly, Edwards may have been liable for all the unpaid rates by reason of the provisions of s. 70 of the Rating Act, 1925. Thirdly, the land itself, of which Edwards was the equitable owner, was subject to the rating-charge arising upon the making of each rate and continuing until its payment: *The King v. Mayor, &c., of Inglewood*(1). These charges could have been enforced against the land alone by sale, but the result of such action would have been to deprive Edwards of his interest in the land.

We deal first with the discharge of Edwards's liability for rates under the agreement for sale and purchase. Pursuant to subs. 3 of s. 42, the effect of the Court's determination that he was not entitled to retain the farm lands was to render inapplicable the method of adjustment of liabilities dependent upon the application of the basic value to the amounts secured by any adjustable security or securities and to make the provisions of s. 48 applicable. The effect of s. 48 was to make the liability of Edwards for rates under the agreement for sale and purchase an adjustable debt, and to authorize the Court to apply the provisions of s. 49 and to discharge that debt in whole or in part. The order actually made by the Court to the extent to which it discharged the personal liability of Edwards under the agreement for sale and purchase was clearly within the jurisdiction of the Court.

Similar reasoning applies to Edwards's personal liability, as an owner or actual occupier for unpaid rates arising from the operation of the provisions of s. 70 of the Rating Act, 1925. As Edwards was a farmer applicant, his adjustable debts, by reason of the definition of "adjustable debts" in s. 4 (1) of the Act of 1936, included all his unsecured debts or liabilities. Clearly the Court of Review had jurisdiction under s. 49 to discharge any personal liability of Edwards arising under the provisions of s. 70 of the Rating Act.

The last way in which Edwards was liable for the unpaid rates was under the rating-charges. He was a farmer applicant, and

(1) [1931] N.Z.L.R. 177; G.L.R. 63.

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the definition of "adjustable security" in s. 4 (1) included any statutory charge on any property belonging to him. To the extent, therefore, to which the unpaid rates were amounts owing by Edwards under the rating-charges, they were amounts owing under adjustable securities and the Court of Review again had jurisdiction to discharge them under ss. 48 and 49. 5

Edwards could thus be, and was, completely relieved from any personal liability for the rates. As he was required to give up possession of the land, the question whether the rating-charges continued to exist on the land did not affect him. But if they continued to exist, they would affect an incoming equitable owner. Now the discharge of Edwards from his personal liability did not, of itself, release the land from the rating-charges or discharge any other person who might be liable for payment of the rates. This appears from the statutory provisions. Subsection 1 of s. 48 limits the operation of the discharge under s. 49 by providing that the total amount owing by the applicant under any adjustable security is deemed to be an adjustable debt "except to the extent (if any) to which it may be otherwise secured." The last paragraph of subs. 1 of s. 48 provides as follows :— 10 15

The discharge, through the operation of this subsection, of the applicant's liability for the whole or any part of the amount owing under any adjustable security shall not be deemed to release any property from the whole or any part of the amount secured thereon by the adjustable security.

This provision shows that the release of the personal liability does not of itself release the property from its charge or security. Subsection 2 of s. 48 also bears upon the matter. For the purposes of this case, its effect is that if the property of any applicant has been sold under the powers conferred by the Rating Act, 1925, in respect of a judgment for unpaid rates, and the net proceeds are not sufficient to pay the total amount secured on the property by any adjustable security, the amount remaining unpaid "except to the extent (if any) to which it may be otherwise secured or may not be owing by the applicant" shall be deemed to be an adjustable debt and may be discharged under s. 49. 25 30 35

All these statutory reservations of liability only apply where the personal liability of the applicant or his interest in his property has been dealt with in the manner indicated by the statutory provisions creating the reservation. In our view, there is nothing in these provisions to show that the release of the charge for rates or the discharge of the liability of any other person to pay them would be contrary to the scope and purpose of the Act if sufficient authority to effect that release or grant that discharge otherwise appeared in the Act. We think that it does otherwise appear. 40

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Relief from personal liability for all or some of the unpaid rates and the release of the land from the rating-charges supporting them were obviously matters of importance to Smyth. He was being compelled by the Court to resume for the future the equitable ownership of this heavily-rated land. He was being deprived of his contractual right to have recourse to Edwards for about two-thirds of the arrears for which he was liable under the judgment. He was being so deprived although he had been out of actual occupation since September, 1935. Relief from personal liability alone was not enough. If the land of the equitable owner could be sold, the result to him would be the same as the enforcement of a personal liability. The Court of Review had therefore to consider whether, in requiring Smyth to resume the equitable ownership for the purpose of giving relief to Edwards, the Court should afford Smyth some relief from his personal liability and from the rating-charges. The Court thought that it should. The question for this Court is whether the Court of Review had jurisdiction for the purpose. We think that it had.

In the first place, the fair and just treatment of Smyth was clearly a matter which, under subs. 1 (d) of s. 41, the Court of Review might deem relevant, when engaged in considering whether Edwards was entitled to retain the farm lands. That was a matter which arose or could be deemed by the Court of Review to arise upon the application of Edwards as a farmer applicant for relief. To bring such a matter before the Court, it was unnecessary that Smyth himself should have filed any application for relief.

In the second place, it has not been shown to us that the Court of Review exceeded its jurisdiction in dealing with this matter of the fair treatment of Smyth by discharging him from the arrears of rates at April 1, 1937, and by releasing the land from the charges in support of those rates. It is clear from s. 71 of the Act that the Court has, in every matter coming before it, full power and jurisdiction to deal with and determine that matter in such manner and to make such order, not inconsistent with the Act, as it deems just and equitable in the circumstances of the case, notwithstanding that express provision in respect of that matter is not contained in the Act. The fair and just treatment of Smyth was a matter coming before the Court on Edwards's application. We are entitled to assume that the Court of Review deemed its order just and equitable in the circumstances of the case.

The only question remaining is whether the order was one which was "not inconsistent with this Act." We think that

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these words should have a wide interpretation. The general authority granted to the Court is that it shall have all the powers inherent in a Court of record (s. 10 (1)), and that it may make such order as it deems just and equitable in the circumstances of the case (s. 27 (3)). No doubt, the Court could not make an order completely outside the scope and purpose of the Act, such as, for example, a decree in divorce. So much was admitted by all counsel. But where a matter is properly before the Court of Review, and that Court may do in that matter what it deems just and equitable in the circumstances and, in so doing, observes the principles of natural justice, it is difficult indeed, to see how the Supreme Court can say that any determination of that kind is beyond the jurisdiction of the Court of Review. The test cannot, we think, be less than that submitted by Mr. *Goodall*—namely, whether the Supreme Court can say that the Court of Review should not have begun the inquiry as to what was just and equitable, but should have stopped short, and held that the matter it was proposing to consider was not a matter coming before it which it could decide in any way it thought just and equitable, but was a matter outside the scope, intent, and purpose of the Act. That cannot be said here. It is clear that in determining what relief should be given to Edwards the Court might have to decide what would be fair treatment of Smyth in respect of arrears of rates. If it considered, as it did, that the relief to be granted to Edwards required in fairness to Smyth the remission of certain rates due by him and the release of the rating-charges securing them and made an order accordingly, then the Court of Review was exercising, not inconsistently with the Act, a jurisdiction conferred upon it by the general provisions of the Act. The same conclusion seems justified if the matter is regarded from a slightly different angle. In our opinion, the relief of Smyth from personal liability for rates was, in the circumstances, not inconsistent with the Act, and, that being so, and the relief of the land from the rating-charges being necessary in order to make effective the relief of Smyth from personal liability, the Court of Review had jurisdiction to grant both forms of relief. In our opinion, neither certiorari nor prohibition should go in respect of the order made, and the motion must be dismissed.

The amount involved in this case is small though the question raised is important. We think we should fix the costs. The plaintiff will pay to the defendant, Smyth, the sum of £26 5s. for his costs, plus any disbursements to be fixed by the Registrar.

The plaintiff will pay to the defendant, Edwards, the sum of £15 15s., plus any disbursements to be fixed by the Registrar.

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Motion dismissed.

Solicitors for the Henderson Town Board: *Brookfield, Prendergast, and Schnauer* (Auckland), as agents of *R. Elcoat* (Henderson).

Solicitors for J. Edwards: *Matthews and Clarke* (Auckland).

Solicitor for H. F. B. Smyth: *Bruce Scott* (Auckland).

PATERIKI HURA AND NGAROIMATA MOOTU
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Natives and Native Land—Injunction—Timber—Native Land Court restraining the Cutting of Timber on Native Land—Certiorari to set aside Injunction—Matters for determination by Supreme Court—Native Land Act, 1931, ss. 50, 533—Native Purposes Act, 1938, s. 3.

Mar. 4, 5, 20.

JOHNSTON, J.

Apart from the question of fraud, on a motion for certiorari to set aside an injunction made by the Native Land Court under s. 533 of the Native Land Act, 1931, as amended by s. 3 of the Native Purposes Act, 1938, prohibiting the cutting or removal of timber from any Native freehold land, the only question to be determined by the Supreme Court is whether the Native Land Court was properly seised of the matter brought before it.

Hakopa Te Ahunga v. Seth Smith(1) applied.

Te Heuheu Tukino v. Aotea District Maori Land Board(2) referred to.

(1) (1906) 25 N.Z.L.R. 587.

(2) [1939] N.Z.L.R. 107.

MOTION for certiorari in which plaintiffs sought to set aside an injunction made by the Native Land Court restraining them from cutting timber on their land.

Two motions were subsequently filed, one by the Native Minister and the other by the Aotea District Maori Land Board, in effect identical, to dismiss plaintiffs' motion and strike out the affidavits in support, or parts thereof, on the ground that the proceedings were vexatious and that the affidavits contained scandalous and irrelevant matter, were first heard.

10 The argument sufficiently appears from the judgment.

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AND
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Hampson and Cleary, for the Native owners.

Cooke, K.C., and Izard, for the Aotea District Maori Land

Board.

Bain, for the Native Minister.

Cur. adv. vult.

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JOHNSTON, J. It was alleged by defendants that the paragraphs in question imputed fraud, and that if it were alleged that the injunction should be quashed because it had been induced by fraud, such allegation should be unequivocal and the nature of the fraud stated with precision. While agreeing with this contention, 10 certain of the allegations in the affidavits supporting the motion for certiorari which were objected to were, in my opinion, possibly relevant to the question of the nature of the interest justifying intervention by defendants, and the proprietary rights which, it may be argued, are necessary to support the grant of an 15 injunction, if it were within the province of this Court to consider such questions. Consequently, on these motions, I limited my order to one removing those parts of the affidavits which, to my mind, amounted to no more than loose suggestions of improper motive. 20

I have now to consider plaintiffs' substantive motion for certiorari.

Plaintiffs are sole owners of a freehold block of 990 acres, known as Waimanu 2 D., situated in the Tongariro timber lands. The real present value of this land is its standing timber, 25 estimated as being worth at least some £30,000. Defendant Board is mortgagee of plaintiffs' lands and certain adjacent blocks to secure some £23,500. A commissioner has been appointed to determine the proportion each block will have to bear, and defendant Board admits the proportion to be borne by Waimanu 30 2 D. will not amount to more than approximately £165.

Purporting to act under s. 533 of the Native Land Act, 1931, as amended by s. 3 of the Native Purposes Act, 1938, the Native Land Court, on the application of defendants, granted on December 20, 1939, an injunction in the following terms:— 35

To Pateriki Hura and Ngaroimata Mootu and any other person or persons whether European or Native.

You are and each of you is hereby ordered to refrain from cutting or removing, or authorizing the cutting or removal, or otherwise making any disposition of any timber-trees, timber, or other wood in and upon the said land, called Waimanu 2 D., provided, however, that, unless it should be in 40 any manner previously dissolved, this order shall automatically determine and cease to operate at the expiration of one month from the time when the decision of the Privy Council in regard to *Te Heuheu Tukino v. Aotea District Maori Land Board* becomes known to the parties in New Zealand. 45

It is to be observed the injunction is addressed not only to the owners, but to all persons, European or Native, irrespective of the existence of lawful rights to cut.

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- The Deputy Chief Judge of the Native Land Court, in granting the injunction, delivered the following short judgment: "I do not think it is necessary to give a decision of any length. I have no doubt that the Court has jurisdiction under the wide provisions of [s. 533 of the Native Land Act, 1931, as amended by] s. 3 of the Native Purposes Act, 1938. It is obvious, I think, that this Court cannot enter into the question of the Natives' claims or grievances. See the remarks of the Right Honourable the Chief Justice in the Court of Appeal: *Te Heuheu Tukino v. Aotea District Maori Land Board*, [1939] N.Z.L.R. 107, 119, 120. Litigation initiated by the Natives themselves is still pending, and upon the issue of that litigation the rights of the parties to it, as well as the Crown and Native owners of other blocks similarly situated, will be affected to an extent not definitely ascertainable in the meantime. Upon that ground only, I think, the injunction applied for should issue with the proviso that, unless it should be in any manner previously dissolved, it shall automatically determine and cease to operate at the expiration of one month from the time when the decision of the Privy Council becomes known to the parties in New Zealand."

- While more than one ground was advanced by defendants to support their application, from this judgment it appears that the only ground upon which the injunction was granted was the existence of certain litigation between certain Natives and the defendant Board. But the sole purpose of that litigation was, as explained by *Smith, J.*, in *Te Heuheu Tukino v. Aotea District Maori Land Board* (1), to obtain an indemnity against the payment of the mortgage of £23,500 referred to. It is not suggested that the liability of plaintiffs, which has been assessed by the defendant Board, can be increased, whether the Privy Council determines the imposition of the charge is repugnant to the provisions of the Treaty of Waitangi or not.

- It is not denied that the injunction in this case interferes with the principal attribute of ownership—namely, the right to use one's land for one's own purposes—and that, apart from the special provision under which the Native Land Court acted, it had no right to prohibit the owners from enjoyment of that right. Normally, one would not expect jurisdiction which covers

(1) [1939] N.Z.L.R. 107, 112.

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such fundamental interference with Native owners' rights and rights acquired by Europeans in Native freehold land to appear as an amendment to a paragraph in the Native Land Act not concerned with jurisdiction. It must not be forgotten, however, that the Native Land Court is, in effect, *parens patriae* of Native lands, and that while as a whole the powers of the Native Land Court are chiefly designed to determine questions arising between Natives and concerning Native ownership the Legislature may have found it desirable not only to give the Court wider powers in relation to such matters than the ordinary Court enjoy in relation to European questions concerning European land, but, in addition, more general powers based on a supposed Native immaturity of judgment, to conserve Native lands and the profits thereof from uneconomic use and exploitation. Section 533 cannot, therefore, in my opinion, be limited merely because its provisions, if applied to European land, would appear entirely inconsistent with European conceptions of ownership, if the powers, though wide, are expressed in clear and unambiguous language.

Section 533 (2) of the Native Land Act, 1931, as amended by s. 3 of the Native Purposes Act, 1938, reads as follows:—

(2) (a) The Court may at any time, on application made by any person interested or by a Registrar of the Court, or of its own motion, issue an order by way of injunction prohibiting any person or persons, whether European or Native (including an owner or owners), from cutting, or removing, or authorizing the cutting or removal, or otherwise making any disposition of any timber-trees, timber, or other wood, or any flax, kauri-gum, or minerals on or from any Native freehold land.

The main argument advanced by plaintiffs in support of their motion to quash the injunction is that, taking its place in s. 533 of the Native Land Act, 1931, in lieu of subs. 2 of that section, which was repealed, the injunction contemplated must be one restraining unlawful acts, and not lawful acts, and that the use of the injunction to prevent lawful dealing by owners with their own land is in excess of jurisdiction. It is true that s. 533, which was designed to make the wilful cutting of timber on Native freehold land without authority, and disobedience to an injunction of the Court restraining such cutting, offences triable summarily, did not grant jurisdiction to the Native Land Court in addition to that expressly conferred upon it by s. 27, save that the defences available to a partial owner were taken away from him. Again, it is true that under s. 533, a general injunction against the owners of Native freehold land, preventing them from cutting timber, would have been outside the jurisdiction of the Native Land Court. Despite these considerations, which might solve any ambiguity as to the meaning of the amending section, one's first duty is to

- consider the language of the section. Manifestly the jurisdiction granted is a wide one. The wisdom of granting such powers as the language employed appears to give to the Native Land Court is not a matter for this Court. In *Hakopa Te Ahunga v. Seth-Smith*(2), *Stout*, C.J., says: "So long as a Native Appellate Court is seised of a dispute between Natives and Natives affecting the title to Native lands, the Native Appellate Court may deal with it as it pleases. It may proceed contrary to what is called natural justice. It may also adopt a procedure that an English Court, or the Supreme Court or Court of Appeal of this Colony, would not adopt, and if it does so this Court cannot interfere. The Legislature has, in fact, clothed it with more power than it has given to the Supreme Court of New Zealand, and, though thousands of pounds may be involved, the interests of Natives are left to it unhampered by appeal or by the control of it by the Supreme Court or the Court of Appeal of New Zealand. This, in our opinion, is the law, and it is not for this Court to inquire whether the law is wise or not. This Court must administer the law"(3).
- Therefore, even if I were convinced that the reasons given by the Native Land Court for granting the injunction it did would not be sufficient to support an injunction if the question in issue before the Native Land Court had arisen before this Court, it appears to me the only question I have to determine is whether the Native Land Court was properly seised of the matter brought before it.

- The language of s. 533 of the Native Land Act, 1931, as amended by s. 3 of the Native Purposes Act, 1938, in my view, cannot be interpreted otherwise than a granting to the Native Land Court of power to protect Native freehold land from having the timber, &c., on it cut by all and sundry, including even the owners thereof, and whether despite the fact that rights to cut may be vested in Natives or Europeans. If this is so, on the face of it, the injunction is within the jurisdiction of the Native Land Court. By s. 50 of the Native Land Act, 1931, orders of the Native Land Court or of the Appellate Court cannot be removed by certiorari or otherwise into this Court, unless the order in its nature or substance was made without or in excess of jurisdiction, and all orders, according to that section, are to be presumed to have been made within the jurisdiction unless the contrary is proved, or appears on the face of the order. It has been held that if it is shown that the order has been obtained by

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fraud, this Court has power to quash such order, but in this case it is clear that all relevant facts concerning the interest of plaintiffs in the land concerned, the position of defendant Board as mortgagee, the history of the dealings of the block of which plaintiffs' lands form part, and of the litigation at present pending were placed before the Court, and whether or not one thinks the grounds for granting the injunction were such as would have appealed to this Court, it is impossible, in my view, to substantiate a claim that the Native Land Court was misled, or that the order was induced by fraud. For the same reasons, I think that the various grounds which were put forward by defendants to support the grant of an injunction in this Court, and the right of defendants to apply as persons interested, cannot be inquired into by this Court, first, because it appears to me they do not go to the question of jurisdiction, and were *res judicata* for the Native Land Court alone, and, secondly, because they were not acted upon by the Native Land Court save so far as the result of the appeal to the Privy Council in *Te Heuheu Tukino v. Aotea District Maori Land Board* might have affected them. However unconfined the jurisdiction conferred on the Native Land Court appears to be, it must, I think, be admitted, since it avails to control Europeans as much as Maoris, including Maori owners, that it creates a powerful weapon that may well be used in many cases to protect Maori interests, and Maori owners. The view that wide powers are intended is supported, I think, by the provisions of para. (c) of subs. 2 of s. 533 of the Native Land Act, 1931, as amended by s. 3 of the amending Act, which reads as follows :—

(c) An injunction issued under this subsection may be directed to any particular person or persons or may be directed to any class or body of persons without specifying all or any of the names of the persons comprising such class or body. In any case where an injunction is directed to a class or body of persons, the injunction shall bind all the persons comprising such class or body, whether or not they are parties to or have had notice of the proceedings and whether or not they are subject to any disability.

In my view, therefore, the injunction granted was within the jurisdiction, and the motion for certiorari must be dismissed. I should add that I have not been asked to consider the main alternative ground of plaintiffs' motion that s. 533, as amended, is repugnant to the Treaty of Waitangi as it has been admitted that the history of plaintiffs' title is on all fours with that in *Te Heuheu Tukino v. Aotea District Maori Land Board*, and I am bound by the decision of the Court of Appeal in that case.

As the greater part of the first day was occupied with defendants' motions to strike out portions of plaintiffs' affidavits,

and their applications were only partly successful, I allow costs to defendant Board, twenty-five guineas and disbursements, and to the defendant Native Minister, fifteen guineas and disbursements.

Motion dismissed.

Solicitors for the Native owners: *Hampson and Chadwick* (Rotorua).

Solicitors for the Aotea District Maori Land Board: *Marshall, Izard, and Wilson* (Wanganui).

Solicitors for the Native Minister: *Bain and Fleming* (Wanganui).

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HOKIANGA COUNTY
DEFENDANT

AND

PARLANE BROTHERS
PLAINTIFFS.

APPELLANT

RESPONDENTS

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Negligence—Local Authorities—Bridge—Temporary Repairs to Bridge not renewed—Knowledge of Danger—No Warning to Users of Highway—Liability for Damage to Motor-car through Collapse of Bridge—Misfeasance.

A local authority which repairs a bridge under its jurisdiction with material suitable only for temporary repairs, and which, knowing that the bridge has become dangerous, has never permanently renewed the bridge nor erected any warning that it is unsafe, has caused a nuisance to the highway, has been guilty of misfeasance, and is liable for damage to a motor-car that, owing to the collapse of the bridge from the rotting of the temporary material, falls into the river below.

Borough of Bathurst v. Macpherson(1) and *Stoddart v. Ashburton County*(2) followed.

Newsome v. Darton Urban District Council(3) and *Moul v. Croydon Corporation*(4) applied.

Municipality of Pictou v. Geldert(5) and *Municipal Council of Sydney v. Bourke*(6) explained.

Tarry v. Taranaki County Council(7) referred to.

(1) (1879) 4 App. Cas. 256.

(2) [1926] N.Z.L.R. 399; G.L.R. 304.

(3) [1938] 3 All E.R. 93.

(4) (1918) 119 L.T. 318.

(5) [1893] A.C. 524.

(6) [1895] A.C. 433.

(7) (1894) 12 N.Z.L.R. 467.

APPEAL on law and fact from the decision of Mr. G. N. Morris, Stipendiary Magistrate, sitting at Rawene. The respondents

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sued appellant for £86 17s. 3d., damages caused to a motor-truck, which, while being driven across a bridge in the County of Hokianga on Hook's Road, fell into the stream below owing to the collapse of the bridge.

The bridge in question was on a road which served only three settlers. It had been built some twenty years before of kauri. In February, 1935, a flood in the river washed away two spans. The bridge was repaired by appellant county by means of three *pinus insignis* rikas or stringers, and by spiking the decking to these stringers. According to the regulations in force in the county at the time the maximum load of the bridge was stated to be $4\frac{1}{2}$ tons. 5 10

On August 24, 1936, less than eighteen months after the bridge had been thus repaired, it was inspected by the Assistant Road Engineer of the Public Works Department and found to be in a dangerous condition requiring renewal. In his report he said : 15

The piles and piers are sound, but the whole superstructure is badly rotted, two centre spans having been carried away by floods in February, 1935, and replaced by three *pinus insignis* rikas. The bridge is definitely in a dangerous condition, and the whole superstructure requires renewing. A copy of this report was sent to the county engineer. Nothing was done. 20

On July 16, 1937, the Public Works Department wrote to the clerk of the County Council again pointing out the unsafe condition of the bridge. The county engineer replied on August 12, 1937, stating that while he appreciated the necessity for renewing the bridge it was beyond the financial resources of the county to do so. On August 16, 1937, the district engineer recommended a Government subsidy of £4 to £1 if the county would undertake the work of renewing the bridge, and the county engineer was sent a copy of this recommendation and asked to advise the Public Works District Engineer whether the county was agreeable to do the work on the terms proposed. No reply was received to this request, and the next letter received by the Public Works Department from the county clerk was a letter dated August 12, 1938, in which he said : 25 30 35

I have to advise that on Monday the 8th instant, while Messrs. Parlanes' truck was crossing the bridge, the central span totally collapsed, letting the truck fall into the river. This bridge was severely damaged by the floods in 1934, and was temporarily repaired with *pinus insignis* stringers which are just on four years old. The condition of this structure is such that it is impossible to carry out repairs of a temporary nature in order to afford access to the settlers concerned. 40

The letter went on to say that although the question of access was vital to the settlers it was not possible owing to its finance for the county to contribute to the cost of renewing the bridge. 45

Not only did the County Council take no steps to repair the bridge, although it had fair warning of its dangerous nature, but it erected no warning-sign that it was unsafe, although it had erected such signs at other bridges in the county, and it actually
5 approved of a *New Zealand Gazette* notice of December 22, 1937, raising the maximum load of the bridge from $4\frac{1}{2}$ tons to 5 tons.

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At the hearing of the case it was admitted that appellants were a body corporate under the Counties Act, 1920, and that the bridge and road were under its jurisdiction. Evidence was
10 given by Mr. H. Langlands, Assistant Road Engineer of the Public Works Department, of the facts stated, and he also stated that *pinus insignis* was never used in permanent bridge structures owing to its fast rate of decay, but that it was frequently used for temporary repairs. He stated that it was a very strong timber
15 when sound, but that it decayed at a rapid and uncertain rate. He mentioned that there were bridges where *pinus insignis* stringers had lasted for a number of years, but they were always subject to frequent inspection by the departmental bridge inspectors. Some had actually lasted up to seven years, but he
20 said that two years was the most that he would allow as a safe term without renewal. It was admitted by Mr. Langlands that it was sound construction at the time these stringers were put in. The work was done efficiently—no sign of negligence in putting in—rough but sound. . . . The county did a reasonable job so far as the two spans
25 were concerned, and it would be absurd to replace only those two spans with kauri stringers.

The only other expert who gave evidence on behalf of the respondents was Mr. W. A. Gray, a civil engineer of Auckland, who also stated that the use of *pinus insignis* was reasonable for
30 a temporary repair only. By "temporary" he said he meant not more than twelve months. No evidence was called on behalf of the appellants.

The learned Magistrate held that the bridge collapsed because one of the *pinus insignis* stringers had rotted. He held that the
35 work was done efficiently and that it was sound construction at the time it was completed, but that the work was done as a purely temporary job. Thereafter the County Council had never inspected the bridge in order to ascertain its condition; and although they knew that the bridge had become dangerous not
40 only had they never sign-posted it as dangerous, but they had also been a party to raising the maximum load from $4\frac{1}{2}$ tons to 5 tons. On these facts the learned Magistrate held that the County Council had been guilty of misfeasance in accordance with the rule laid down in *Borough of Bathurst v. Macpherson*(1). He also

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held that there had been no contributory negligence on the part of the driver of the truck.

This appeal was from that decision.

Reynolds, for the appellant. The only question the Court is asked to decide is whether this was an act of misfeasance or non-
feasance on the part of the local body. The Magistrate decided
that *Borough of Bathurst v. Macpherson*(2) applies: see also
Newsome v. Darton Urban District Council(3). Here there was
no negligence in the original reconstruction of the bridge, the
material used was suitable for the purpose for which it was used, 10
and the work was efficiently done: *Municipality of Pictou v. Geldert*(4).
Russell v. The Men of Devon(5) states the original principle of liability of local bodies; and see also *Municipal Council of Sydney v. Bourke*(6). The bridge was swept away
by an act of God, and there was no liability on the local authority 15
to repair it. It is different where the local authority has itself interfered with the surface of a road, in which case it is bound to restore it. There was no negligence in the construction, and all the findings of fact are against the application of the *Borough of Bathurst's* case(7). All the authorities are against the Magistrate's 20
finding on the ground of the creation of a nuisance.

Trimmer, for the respondent. It is admitted that a local authority is not liable for mere non-feasance; but, here, the local authority has used a temporary material in a permanent bridge, and this was negligence and amounts to misfeasance: *McLelland* 25
v. Manchester Corporation(8); *Sheppard v. Glossop Corporation*(9); *Moul v. Croyden Corporation*(10); *Stoddart v. Ashburton County*(11); and *Charlesworth on Negligence*, 135, 136. Non-feasance is not a defence if there is knowledge: *Sullivan v. Palmerston North Borough*(12) and *Municipality Woollahra Council* 30
v. Moody(13); and see also *Short on Law of Roads and Bridges*, 62; *Turner v. Borough of Goldburn*(14); and 10 *Australian Digest*, cols. 102, 110. If powers of repair are exercised negligently, this

(2) (1879) 4 App. Cas. 256.

(3) [1938] 3 All E.R. 93, 97.

(4) [1893] A.C. 524.

(5) (1788) 2 T.R. 667; 100 E.R. 359.

(6) [1895] A.C. 433.

(7) (1879) 4 App. Cas. 256.

(8) [1912] 1 K.B. 118, 127.

(9) [1921] 3 K.B. 132.

(10) (1918) 119 L.T. 318.

(11) [1926] N.Z.L.R. 399; G.L.R. 304.

(12) [1917] N.Z.L.R. 744; G.L.R. 428.

(13) (1913) 16 C.L.R. 353, 361.

(14) (1903) 3 N.S.W.S.R. 91.

is misfeasance even if the local authority be not bound to undertake repairs: *Kent v. East Suffolk Road Board*(15).

Reynolds, in reply.

Cur. adv. vult.

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- 5 OSTLER, J. [After stating the facts, as above:] On the appeal the point on contributory negligence was abandoned by counsel for the appellants, and the sole question argued before me was whether it was a case of misfeasance or merely non-feasance on the part of the appellants.
- 10 The law on this point has been in an unsatisfactory state ever since the decision of the Privy Council in *Borough of Bathurst v. Macpherson*(1). In that case it was decided that, even where there was no statutory duty to repair, if a local authority constructed an artificial work on a road, it was bound to keep it in
- 15 such a state of repair as to prevent it being a danger to the users of the highway. The artificial structure in that case was what was called a "barrel drain" placed across the road. It seems that the brickwork which covered the barrel drain collapsed owing to the soil underneath it being washed away, thus causing a hole.
- 20 Some years afterwards the case of *Municipality of Pictou v. Geldert*(2) came before the Privy Council from Nova Scotia. In that case the local authority had allowed the approaches to a bridge to get into a dangerous condition through neglecting to repair them. The Privy Council held that this was a mere
- 25 non-feasance, and purported to distinguish the *Bathurst* case(3), but, in my humble opinion, they are indistinguishable. A bridge and the approaches to a bridge are just as much artificial structures as a barrel drain. If there is a duty on the local authority to keep in repair an artificial work which is con-
- 30 structed on the road, that duty should apply just as much to a bridge or to the approaches to a bridge as it does to a barrel drain.

Our Court of Appeal in *Tarry v. Taranaki County Council*(4), consisting of four distinguished Judges, was unable to find any distinction between the two cases, and while two of the learned

35 Judges definitely came to the conclusion that the later case had, in effect, decided that the earlier case was no longer law, the other two, while not going so far, clearly adopted the principle of the latter case in deciding *Tarry's* case and ignored the *Bathurst* case, for in *Tarry's* case the Court was also dealing with

(15) [1939] 2 All E.R. 207; 4 All (2) [1893] A.C. 524.

E.R. 174.

(1) (1879) 4 App. Cas. 256.

(3) (1879) 4 App. Cas. 256.

(4) (1894) 12 N.Z.L.R. 467.

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an artificial structure. But shortly after the decision in *Tarry's* case came the decision of the Privy Council in *Municipal Council of Sydney v. Bourke*(5). That was merely a case of allowing potholes to form in the road through non-repair, and the Privy Council had no difficulty in following the principle laid down in *Municipality of Pictou v. Geldert*(6), and in holding that it was a case of mere non-feasance ; but the judgment of the Privy Council proceeded to declare that the *Bathurst* case was good law. Their Lordships say : " There can be no doubt, then, that some of the " dicta in *Corporation of Bathurst v. Macpherson* (4 App. Cas. 10 " 256) can scarcely be supported, in view of the more complete " discussion which the subject has subsequently undergone. But " they do not affect the authority of that case, for the decision " rests on grounds independent of them. The conclusion being " arrived at that the defendants had caused a nuisance to the 15 " highway for which they could be indicted, it cannot be doubted " that it was properly decided that the action lay "(7). By this decision the Privy Council seems to have completely eliminated the doubt cast on the *Bathurst* case(8) and to have established it as good law applicable to the facts of that case ; and, if that is so, 20 it seems to me that the learned Magistrate was right in holding on the facts of this case that appellants were guilty of misfeasance. Indeed, so long as the principle of that case is good law, it would seem that a local authority is liable for injury caused by it allowing any artificial structure which it has made on its roads, 25 including a bridge, to become dangerous by falling into disrepair, although this seems to be absolutely contrary to the principle clearly laid down in *Municipality of Pictou v. Geldert*(9).

Happily, however, this case does not raise that point. This is not a case where a permanent bridge properly constructed has after a long period of user collapsed because of non-repair. In this case two spans of the bridge were swept away by an act of God. Thereafter there was no obligation upon the appellant county to repair the bridge. They did, however, repair it in the manner stated. That repair was intended either as a permanent repair or merely as a temporary repair. It seems to me that the county is on the horns of a dilemma. If it was intended as a permanent repair, then, notwithstanding that the work was competently done, the use of a timber which it was known would retain its strength only for a short period, in my opinion, 40 amounted to negligence on the part of appellants. It would be

(5) [1895] A.C. 433.

(6) [1893] A.C. 524.

(7) [1895] A.C. 433, 443.

(8) (1879) 4 App. Cas. 256.

(9) [1893] A.C. 524.

just as negligent as if in building a concrete bridge it decided to cut down the proportions of cement to such an extent that no margin of safety was left. The negligence would consist not in the method of construction, but in the choice of unsuitable material for the work. If, on the other hand, as seems to have been the case from the correspondence, the repair was intended to be merely of a temporary nature, then the appellant county had not finished its work, and in allowing that temporary artificial structure to fall into disrepair so that it became dangerous with its increasing rottenness, to the knowledge of appellants, and without even giving a warning to the public of the danger of which it knew, had caused a nuisance to the highway within the principle of the *Bathurst* case(10).

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In *McClelland v. Manchester Corporation*(11), *Lush, J.*, said :
15 " Once establish that the local authority did something to the
" road, and the case is removed from the category of non-feasance.
" If the work was imperfect and incomplete, it becomes a case of
" misfeasance and not non-feasance, although damage was caused
" by an omission to do something that ought to have been done.
20 " The omission to take precautions to do something that ought to
" have been done to finish the work is precisely the same thing
" in its legal consequences as the commission of something that
" ought not to have been done, and there is no similarity in point
" of law between such a case and a case where the local authority
25 " have chosen to do nothing at all "(12). That passage was cited
with approval by the Full Court of five Judges in *Stoddart*
v. Ashburton County(13), and the passage, in my opinion, equally
applies to the facts of this case. Appellant erected a temporary
construction on the road which it ought to have known would
30 become dangerous to the public in a short time. The repair was
incomplete and it was never completed, although appellant had
notice that the work had become a danger to the public. In my
opinion, therefore, what was done amounted to misfeasance and
not merely to non-feasance. They caused a nuisance to
35 the highway, and knowing, as they should have done, that their
work would soon become dangerous unless permanently renewed,
and knowing later that it had become dangerous, they did nothing
either to remove or give warning of the danger. In my opinion,
in view of the state of the law, the learned Magistrate was right
40 in coming to the decision that the case was directly within the

(10) (1879) 4 App. Cas. 256.

(11) [1921] 1 K.B. 118.

(12) *Ibid.*, 127.(13) [1926] N.Z.L.R. 399, 405 ;
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principle of the *Bathurst* case(14), the authority of which was established in *Municipal Council of Sydney v. Bourke*(15).

The learned Magistrate also cited in support of his judgment a passage from the judgment of *MacKinnon, L.J.*, in *Newsome v. Darton Urban District Council*(16). The learned Lord Justice there said: "If a defect arises in a highway only as the result of
5 "the friction of traffic and the operation of natural causes, and
"that is not remedied by the authority, that is a defect arising
"only from non-feasance. Where, however, the authority, either
"in its capacity as highway authority or otherwise, does 10
"something to the surface of the highway, and that which it does
"is, in addition to the friction of traffic and the operation
"of natural causes, the origin of the defect which they do not
"remedy, then the defect may be regarded as the result of
"misfeasance, and not merely non-feasance"(17). That was a 15
case where the respondents were not only the local highway
authority, but the local sanitary authority. In the latter
capacity they had made an excavation in one of their streets for
the purpose of laying a drain. The excavation had been filled 20
in and the surface covered with metal, which was sprayed with
tar and rolled in by a steam roller which left it level. A year
later a depression had formed at the place which the jury which
tried the case found as a fact was dangerous. The jury, moreover,
found that, although the original work of rolling the excavation 25
was done without negligence, the local authority was negligent
in not discovering and remedying the dangerous condition in
which it subsequently got. It was held by the Court of Appeal
that the local authority was guilty of misfeasance. Two of the
learned Judges decided the case on the ground that the nuisance 30
to the road had been caused by the local authority in its capacity
as a sanitary authority, but *MacKinnon, L.J.*, in the passage
cited, lays down a broader rule—viz., that where a local authority
even in its capacity as highway authority does something to the
surface of the highway and that which it does is, in addition to
natural causes and traffic, the origin of the defect, and the local 35
authority does not remedy the defect, then the local authority
is guilty of misfeasance. It may well be that in this passage the
principle is stated too widely. It would cover the case not only
of a permanent bridge, but the paving of a road with wooden
blocks which had fallen into decay, which has been held to be 40
mere non-feasance: see *Moul v. Croydon Corporation*(18). But

(14) (1879) 4 App. Cas. 256.

(15) [1895] A.C. 433, 443.

(16) [1938] 3 All E.R. 93.

(17) *Ibid.*, 97.

(18) (1918) 119 L.T. 318.

the principle is certainly not stated any wider than in the *Bathurst* case, which is still good law as declared by the Privy Council.

The appeal will accordingly be dismissed, with £10 10s. costs.

Appeal dismissed.

Solicitors for the appellant: *Logan and Reynolds* (Kaitaia).

Solicitors for the respondent: *Connell, Trimmer, and Lamb* (Whangarei).

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[IN THE COMPENSATION COURT.]

JARVIS v. ONE TREE HILL BOROUGH.

Workers' Compensation—Accident arising out of and in the Course of the Employment—Coronary Thrombosis—Heart Diseases—Death during Employment—Effect of Effort—Onus of Proof—Workers' Compensation Act, 1922, s. 3.

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Coronary thrombosis, in that the effort of work is not the cause of its onset, cannot be an injury by accident, but such effort is a danger in every other kind of heart disease.

Wynyard v. Daily Telegraph Co., Ltd.(1); *Harvey v. E. and H. Craig, Ltd.*(2); *McFarlane v. Hutton Bros. (Stevedores), Ltd.*(3); *Fenton v. Thorley and Co., Ltd.*(4); and *Clover, Clayton, and Co., Ltd. v. Hughes*(5), referred to.

Where death occurs while a worker is actually pursuing his employment, and could have resulted only from effort of work, or from disease, or from a combination of both, the onus of proof is on the defendant to show that the death of the worker was not caused by accident arising out of and in the course of his employment.

Gibbs v. Thompson(6) and *Craske v. Wigan*(7) distinguished.

(1) [1934] N.Z.L.R. s. 137; G.L.R. 389.

(2) [1933] N.Z.L.R. s. 102; G.L.R. 605.

(3) (1926) 96 L.J. K.B. 357; 20 B.W.C.C.

222.

(4) [1903] A.C. 443; 5 W.C.C. 1.

(5) [1910] A.C. 242; 3 B.W.C.C. 275.

(6) (1907) 10 G.L.R. 150.

(7) [1909] 2 K.B. 635; 2 B.W.C.C. 35.

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CLAIM FOR COMPENSATION under the Workers' Compensation Act, 1922, in which Elizabeth Kathleen Jarvis, the widow of Frederick Howard Jarvis, claimed compensation as for total dependency, alleging that her husband died as the result of injury by accident arising out of his employment.

Jarvis was a labouring man, sixty years of age, who was employed by the defendant borough continuously from February, 1938, until his death on July 29 following. He was one of a gang engaged in excavating a municipal tennis-court, and the work was in all respects similar to what was ordinarily done in a quarry in that the material excavated consisted of rock. Owing, however, to the proximity of dwellinghouses, no explosives were used, and so large masses of rock were disengaged by drilling holes close to one another, thus permitting blocks to be broken from the rock *in situ* by gadding and splitting. Each block disengaged would be drilled again and split, and finally broken into spawls. Accordingly, there was a great deal of hammer-and-drill work, one man turning the drill by hand and his mate striking it with a sledge-hammer, and hammers varying from 6 lb. to 20 lb. in weight were used, the lighter apparently for the drills and the heavier for breaking the stone into spawls. When it had been sufficiently reduced, the material was taken to an appointed spot by wheelbarrow.

On Friday, July 29, 1938, work commenced at 8 a.m., as usual, and proceeded without incident until 2.30 p.m., or thereabouts. Deceased and a fellow-worker, named John Wall, had been spawling, but later in the day were drilling holes, Wall turning the drill, when deceased fell dead. *Post mortem* examination disclosed the fact that he had been afflicted with long-standing disease of the coronary arteries. Death was not due to coronary thrombosis, however, but there was stenosis or narrowing of the arteries, as a result of which the blood-supply to the heart was insufficient for its nutritional demands, in consequence whereof death ensued. There was generalized arterio-sclerosis and advanced atheroma and calcification of the coronary arteries and aorta. The plaintiff stated that her husband, after he had returned from work the previous evening, "had a bad 'turn' in the kitchen" resembling a faint, that he rested about a quarter of an hour, then had his evening meal, went to bed shortly before 7 p.m., slept well, rose before six o'clock next morning, had breakfast as usual, and walked to work apparently in his usual health. Wall stated that some six weeks before death deceased slipped and fell heavily backwards on a sheet of corrugated iron which was being used as

a flat-sheet on which to shovel material, and that afterwards he was "never the same man," that he frequently showed signs of distress at work, and that in consequence Wall himself used the 20-lb. hammer in spawling, deceased being limited to the 16-lb. hammer for the same work, and he did no wheelbarrow pushing at all.

The medical evidence sufficiently appears from the judgment.

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Haigh, for the plaintiff.

10 *Hore*, for the defendant.

Cur. adv. vult.

O'REGAN, J. In support of plaintiff's claim, I have heard the evidence of Drs. Roche, Tewsley, Fischmann, and Caughey, all of whom state their opinion that the exertion, necessarily involved by the work Jarvis was doing, hastened death. If this be the correct view, the plaintiff is entitled to succeed, notwithstanding that death might have occurred at any time without exertion. It is likewise settled that effort causing death is sufficient to satisfy the statute—that it is not necessary for the plaintiff to prove some particularly severe effort as the immediate cause of death.

Dr. Roche, who was the first witness called for the plaintiff, was satisfied from the *post mortem* findings that the heart had been undergoing atheromatous changes for many years, and from the appearance of the aortic and iliac arteries he would infer widespread atheromatous changes, which, in fact, Dr. Gilmour found. Long-continued high blood-pressure would account for the enlargement of the left ventricle, and the emphysema was very likely of long-standing, but the oedema of the lungs, disclosed by the *post mortem*, was probably quite recent. The narrowing of the coronary arteries by disease would restrict the blood-supply to the heart, would curtail its reserve power, and thus very little effort would be needed to produce a nutritional crisis. There having been no coronary thrombosis, he is satisfied that death was precipitated by the effort necessarily involved in the work deceased was doing. It is a recognized fact that effort is the precipitating factor in a heart affected by coronary disease. With such a heart, effort usually precipitates ventricular fibrillation and death, but ventricular fibrillation leaves no *post mortem* signs. Death might likewise be produced by electrical stimulation of the heart, by chloroform or digitalis poisoning, or even by emotion. Dr. Roche's view may be epitomized thus : In the effort of working,

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the heart demands an increased blood-supply, but with the narrowing of the arteries the blood-supply is diminished, and a slight extra effort will induce ischemia, or bloodlessness, and cause death. With such a heart, anginal attacks are quite possible, and the witness thinks that the "turn" mentioned by the plaintiff, on the evening preceding the catastrophe, coupled as it was with pain behind the left shoulder, was in all probability partly anginal. The very purpose of rest, enjoined by physicians in heart cases, is, as much as possible, to avoid effort, even sitting up in bed.

To the same effect is the evidence of Dr. Tewsley. The condition of the coronary arteries, he says, indicated gross interference with the requisite nutritional supply of blood to the heart-muscle. The condition was such that "the stage was set" for the onset of ventricular fibrillation, and that onset would be made more probable by an increased demand for blood as the day advanced and the work necessarily became more laborious. Dr. Tewsley advances as his opinion the view expressed by Dr. Fitchett in *Wynyard v. Daily Telegraph Co., Ltd.*(1): "In each of the causes of sudden death mentioned, except heart-block, effort would be an important contributory factor. It is true that ventricular fibrillation may occur independently of effort. It might have occurred here with the incidence of the thrombosis as Duncan lay in bed. But, in view of the drastic measures necessary for its production in the healthy experimental heart, it is reasonable to assume that in a heart damaged by coronary thrombosis it is the more prone to occur when the heart-muscle is strongly stimulated to increased activity, as by effort. This is the general opinion, and it is the view that guides medical practitioners in prescribing strict rest for heart cases, such as coronary thrombosis, in which fibrillation is apt to occur"(2).

In *Wynyard's* case the deceased, Duncan, had a thrombosis twelve to twenty-four hours before the catastrophe, and there was a consequential infarct or devitalized part of the heart. Medical opinion agrees that coronary thrombosis itself is not due to effort; but if a thrombosis occurs without fatal results, then it is equally certain that effort must be avoided, and so rest is prescribed. Here, it is common ground that death was not due to thrombosis, though the *post mortem* examination showed an earlier thrombosis, leaving a small infarct which was not a factor in producing the crisis.

Not less emphatic in support of the claim was the evidence of Dr. E. J. Fischmann, who puts the position thus: In the normally

(1) [1934] N.Z.L.R. s. 137; G.L.R. 389. (2) *Ibid.*, s. 147; 395.

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healthy heart there is a parallelism between the nutritional demand of the heart and the supply of blood, and the coronary arteries have a very considerable capacity to respond to any increased demand. If the coronary arteries are diseased, however, they are unable to respond to the demand equally with a healthy heart, and so the reserve of the heart is reduced, and the reduction increases as the disease progresses. Hence, at the moment of increased effort, should they be unable to produce the quantity of blood demanded by the heart, there will be relative ischemia, which may cause cardiac standstill—that is to say, death. That ischemia can cause death has been established by experiments on animals. The coronary arteries in rabbits have been deliberately occluded, after which they were forced to run inside an electric treadmill, the majority of them dying immediately, though pathological examination disclosed no anatomical change in the heart. Some of the animals which survived were killed seven and a half, ten, and twenty hours after the experiment, and in their hearts were signs of necrosis. Thus, it has been proved experimentally that a combination of insufficient blood-supply and effort will cause death. Dr. Fischmann quotes Fishberg on *Heart Failure* (1937), p. 344 :

In arterio-sclerotic, hypertensive, or syphilitic heart disease, either angina pectoris, or, far more rarely, left ventricular failure with pulmonary edema, or even sudden death, may be precipitated by over-exertion. That subjects of coronary arterio-sclerosis should be especially susceptible to deleterious effects from over-exertion seems readily comprehensible in view of the obstacles that the narrowed coronaries must offer to an increase in the blood-supply to the heart commensurate with the greater work.

Among the other authorities relied upon by Dr. Fischmann is an article appearing in the *American Heart Journal* for January, 1940, on p. 85 of which appears the section of the article headed, "The relation of the pathologic findings to the cause of death in patients with coronary artery disease." Under that heading the following appears, *inter alia* :—

In general, it may be concluded that death occurs whenever a sufficiently large area of the myocardium undergoes ischemia, with or without necrosis, or when asystole, ventricular fibrillation, or congestive failure is produced by the ischemia. Such changes in the myocardium arise whenever there is a discrepancy between the nutritional requirements of the heart-muscle, on the one hand, and the factors of supply, on the other hand. . . .

Among those factors which decrease the nutritional supply to the myocardium, the following should be noted :

1. Narrowing and occlusion of the coronary arteries.

2. Lowered blood-pressure, such as is observed in shock from any cause ; also, the low diastolic blood-pressure in aortic insufficiency.

3. Anoxia of the anemic (anemia), stagnant (congestive failure), or anoxic types (pulmonary edema, &c.).

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Among those conditions observed in this study which increase the work of the heart and consequently increase its nutritional requirements, the following may be noted: (1) effort, (2) infection, (3) arterial hypertension, (4) cardiac hypertrophy, (5) valvular stenosis and insufficiency, (6) anoxia caused by pulmonary disease or anemia, and (7) tachycardia.

In connection with the "turn" experienced by deceased on the evening prior to the fatality, Dr. Fischmann is of opinion that it was induced by the extra effort involved in walking home after a hard day's work. As he slept well during the night, the heart had time to recuperate, and thus Jarvis appeared to his wife to be quite well when he left in the morning, as usual, for work. As the day progressed, the heart-reserve became exhausted, and, when its limits had been reached, death ensued. He holds that the heart's efficacy would be reduced for some time after a meal in that a replete stomach causes reflex narrowing of the coronary arteries. Dr. Johnson agrees that such is the effect of a meal, but he thinks that effect would pass off within half an hour.

Dr. Caughey was the last witness in support of the plaintiff's case, and, having studied the *post mortem* findings and heard the evidence, he was satisfied that any physician would have advised Jarvis to refrain from manual labour or effort of any kind. He quotes Lewis on *Diseases of the Heart* (1933), p. 103:

In cardiac cases, anginal or otherwise, that die suddenly, coronary arterial disease is the commonest lesion to be found;

And, again, at p. 250:

There is evidence that the ventricles of elderly people, and especially those presenting coronary disease, are prone to fibrillate.

Any man with a heart in the condition disclosed by the pathological findings here was liable to die at any time, but the risk would be greatly increased by effort, and he quotes McWilliam:

In the many observed cases where all facts point to ventricular fibrillation as the immediate cause of death the common observation of muscular exertion or emotional excitement is notable.

Of Dr. Caughey's evidence it may be said that he accepts entirely the view expressed by the other medical witnesses called in support of the plaintiff's case.

The defence denies injury by accident, and avers that death was due to causes independent of the employment—in other words, that death was due to disease alone, and that Jarvis would have died when he did had he not been at work. In support of this view the defendant borough has called two medical witnesses—Dr. Gilmour, pathologist at the Auckland Hospital, who made the *post mortem* examination, and Dr. T. W. J. Johnson, of Auckland, who has made a special study of heart cases. While he agrees with the plaintiff's witnesses as to general principles, Dr. Gilmour

holds that they have drawn the wrong inferences. Here, there was hypertrophy of both ventricles, degeneration of the heart-muscle itself, and very advanced disease of the coronary arteries, especially of the left descending coronary and of the right, and some
5 disease of the aortic valve. Further, there was generalized arteriosclerosis and emphysema of the lungs. Obviously, the disease was of long standing, and its progress had been so slow that there was compensation by way of anastomoses. That is to say, the minor coronary arteries had increased the blood-supply as the
10 larger arteries narrowed, by which process the nutritional demands of the heart had been satisfied, as a result of which deceased had carried on his work without distress until shortly before the end came. Thus, the heart-condition had deteriorated very gradually, and the *post mortem* examination did not show any sudden
15 development of disability. For these reasons, Dr. Gilmour has concluded that the steady work on July 29 threw no undue strain on the heart. The word, effort, mentioned in the text-books and quoted by plaintiff's witnesses, meant some sudden or abnormal effort beyond the capacity of the heart, and neither the *post mortem*
20 appearances nor the lay evidence indicated that there had been anything of the kind here. A heart in such a condition as that described might well go into ventricular fibrillation without any exciting cause. The word, ischemia, implies a sudden diminution of blood-supply, producing symptoms of pathological changes
25 which were entirely wanting in this case.

Dr. Johnson, who heard Dr. Gilmour's evidence, agrees entirely therewith. He traverses the quotations relied upon by the plaintiff's witnesses, and maintains with an emphasis that indicates strong conviction that, if these are fairly read, their mean-
30 ing is that effort must be some sudden and unexpected movement or range beyond the capacity of the damaged heart. For example, he refers to the extract from Lewis on *Diseases of the Heart*(3) relied on by Dr. Roche and Dr. Caughey, and maintains that, as the learned author refers to effort, emotion, and poisoning by digitalis
35 as causes of ventricular fibrillation, he had not in mind the strenuous demand on the heart contemplated by the plaintiff's witnesses. "The ultimate cause of fibrillation is still unknown," says Lewis (p. 205), but Dr. Johnson points out that it occurs during exercise, during rest, even during sleep, in practically equal
40 proportions, and so there is no reason for preferring any one cause to another.

With the greatest respect to Dr. Gilmour, it seems to me that nothing really important turns on the fact of collateral circulation

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which existed here. The existence of collateral circulation, of course, proves that the disease was of long standing and had gradually developed, inasmuch as anastomosis cannot take place where there is a sudden failure of blood-supply owing to the occlusion of a large artery. Here, it would appear that all the arteries were equally sclerosed, and hence it follows that nothing more than the gradual progress of the disease is established by the existence of collateral circulation. A time must come when the circulation will be unequal to supplying the nutritional demands of the heart, and the question still remains whether the effort of labouring work, bearing in mind that since *McFarlane v. Hutton Bros. (Stevedores), Ltd.*(4), it is not necessary to prove any particular strain, will hasten that crisis. I make one further comment on Dr. Gilmour's evidence: It seems to me that, by themselves, the pathological appearances in a diseased heart will throw little, if any, light on the question raised here—whether death was accelerated by effort. In cases of hernia, operation will indicate whether the disability is of recent origin or of long standing, and frequently in that class of case the evidence of the surgeons who performed the operation determines the question of liability. With a diseased heart, however, the case is surely very different. This fact is well illustrated by the case of *Harvey v. E. and H. Craig, Ltd.*(5). In that case the deceased was a driver, who, during the forenoon, had been seized with anginal pains while lifting a heavy bale of wool. After resting a while, the pains passed off, and he resumed his work. At 1 p.m. on the same day he drove his lorry off, and half an hour later was found in a dying condition on the roadside beside the lorry. No one saw what happened in the interval between the departure of the lorry and the moment he was discovered. There was no *post mortem* examination, but Dr. Fitchett, the medical referee in the case, does not mention that fact as causing any difficulty in discovering the cause of death. It was not a case of coronary thrombosis. Dr. Fitchett reported, *inter alia*, "That lack of evidence of what took place between 1 o'clock, when he set out for Otahuhu, and 1.30, when he was found dead, makes it impossible to determine, or justly infer, the exciting cause of death"(6). In his report on a subsequent case, *Wynyard v. Daily Telegraph Co., Ltd.*(7), a case in which his services as referee were again invited, Dr. Fitchett compares the two cases: "In

(4) (1926) 96 L.J. K.B. 357; (6) *Ibid.*, s. 109; 608.

20 B.W.C.C. 222.

(5) [1933] N.Z.L.R. s. 102; G.L.R.

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(7) [1934] N.Z.L.R. s. 137; G.L.R.

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- "the course of the hearing comparison was made with the case
 " *Harvey v. E. and H. Craig, Ltd.* ([1933] N.Z.L.R. s. 102),
 "and differences of opinion were expressed by medical
 "witnesses. It seems pertinent that I should express an
 5 "opinion on this point. In my view the cases are closely
 "similar, but there is one all-essential difference—viz., in Duncan's
 "case the evidence covers the course of events right to the point
 "of death, while in *Harvey's* case there was no evidence of how
 "the deceased met his death, of the nature of his death, or of
 10 "whether he was subjected to any effort that may have acted
 "as an exciting cause of death. . . . In *Harvey's* case the
 "claim failed because lack of evidence of what took place after
 "he had passed from observation made it impossible to infer
 "either the nature or the exciting cause of death, and that
 15 "precluded impeachment of the work he had been engaged upon.
 "In my view, had Harvey died under observation while loading
 "his lorry with bales, his widow's claim must, as the law stands,
 "have succeeded. On the other hand, had Duncan ceased work
 "at 11 o'clock and gone home to lunch, and later been sent out
 20 "on an errand and had been found dead in a lonely street, the
 "present claim must have failed"(8).

- Thus Dr. Fitchett corroborates conclusively the view I take,
 that cadaveric or *post mortem* appearances of themselves, unsup-
 ported by the evidence of witnesses who were present at the death,
 25 cannot assist in determining whether a heart attack has been
 precipitated by effort. Had the deceased in *Harvey's* case
 been found where he was dead with a fractured skull, death by
 accident would have been presumed at once. As he died from
 no visible or external violence, there was nothing in the appearance
 30 of the body to suggest physical injury, and Dr. Fitchett does not
 suggest that *post mortem* examination would have aided in
 determining anything more than the fact, demonstrable other-
 wise, that deceased had heart disease.

- Time was when the word—accident—was thought to be limited
 35 to cases of bodily injury by "violent, visible, and external means."
 The great majority of the cases, however, in which, prior to the
 Workmen's Compensation Act, 1897, the meaning of the word
 was considered, arose out of disputes concerning policies of insur-
 ance in which the word was defined. Thus, in the Scottish case,
 40 *Clidero v. Scottish Accident Insurance Co., Ltd.*(9), the deceased
 held a policy of accident insurance providing that he was to

(8) [1934] N.Z.L.R. s. 137, s. 149, (9) (1892) 19 R. (Ct. of Sess.) 355;
 s. 150; G.L.R. 389, 396. 29 Sc.L.R. 303.

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receive payment in respect of "bodily injury caused by violent, "accidental, external, and visible means." He was a very stout man, but suffered from no disease of any kind, and in the act of dressing he was putting on his stockings, when he suffered an intestinal injury of which he died. His widow's claim for the insurance-moneys failed on the ground that he had not been injured by accident in terms of the policy. *Hensey v. White*(10) is one of the earliest English cases reported under the Workmen's Compensation Act. There, the deceased, a cabinetmaker, while in the act of attempting to start a gas-engine in the course of his employment, ruptured the small blood-vessels of the stomach and intestines. *Post mortem* examination disclosed ulceration of the pylorus and chronic inflammation of the whole surface of the stomach, and the medical witnesses at the trial were of the opinion that the effusion of blood was consistent with this having been caused by the strain, and that the diseased condition of the stomach without the strain would not have caused the death. The Court of Appeal held that the efficient cause of the injury was the diseased or impaired physical condition, and that the injury was not caused by accident within the meaning of the Act of 1897. The report shows that many of the authorities cited by counsel during the argument were insurance cases. The next authoritative case would appear to be *Fenton v. Thorley and Co., Ltd.*(11), a decision of the House of Lords. The circumstances under which the injury was suffered were very similar to those in *Hensey's* case, in that the injured man, in the course of his employment, was endeavouring to turn a wheel, which had become stiff and so difficult to start. In exerting himself, he suffered from hernia, and was immediately disabled. In an arbitration in the County Court the learned Judge held himself bound by the authority of *Hensey v. White*(12). The case was taken to the Court of Appeal, where the three Lords of Appeal approved his decision, and the worker appealed to the House of Lords. That tribunal held that the case was one of injury by accident within the meaning of the Workmen's Compensation Act, 1897. *Hensey v. White* was expressly overruled, and it was Lord Macnaghten who said that the word—accident—must be considered in the "popular and ordinary sense": "If a man, in lifting "a weight or trying to move something not easily moved, were "to strain a muscle, or rick his back, or rupture himself, the mishap "in ordinary parlance would be described as an accident. Anybody

(10) [1900] 1 Q.B. 481; 2 W.C.C. 1. (12) [1900] 1 Q.B. 481; 2 W.C.C. 1.

(11) [1903] A.C. 443; 5 W.C.C. 1.

"would say that the man had met with an accident in lifting
"a weight, or trying to move something too heavy for him"(13).

It is well known that hernia is not necessarily an accident. The disability occurs because the sufferer has a congenital pre-
5 disposition thereto. It may occur while a man is exerting himself, and in that case, if he was in the course of his employment, as in *Thorley's* case, he has suffered an injury by accident, entitling him to compensation. Like any other disease, however, it may disable the sufferer on other occasions, even while he is not exerting
10 himself at all, in which case it is outside the Act.

Thus, it will be seen that *Fenton v. Thorley and Co., Ltd.*(14), really marks an epoch in the history of the Workers' Compensation Act in that it begins the long series of accident cases in which disease is an element. In principle, there is no distinction between
15 a case in which hernia is the predisposing factor and a case in which heart disease exists. In either case there would have been no accidental injury but for the diseased condition. Nevertheless, if the injury should prove fatal, the legal position is the same as in a case in which there was no disease, but a normally healthy
20 person. *Fenton v. Thorley and Co., Ltd.*, was followed in New Zealand by this Court (per *Sim, J.*) in *Gibbs v. Thompson*(15). In that case, the plaintiff, a young man, had heart disease following rheumatic fever, and, while he was exerting himself in the course of his employment, a particle of vegetation became detached
25 from the mitral valve of the heart, and, getting into the circulation, caused cerebral haemorrhage and paralysis. A few months later came the case of *Whiteford v. The King*(16), the first heart case in the history of the legislation dating from 1897 in England and from 1901 in this country. The deceased, a linesman employed
30 by the Post and Telegraph Department, was in the act of using a brace and bit to bore a hole in a telegraph-pole, for which purpose he stood on top of a ladder, the chief weight of his body being supported by a rope passing round him and fastened to the pole above and in front of him. While in that position, he
35 collapsed and died. *Post mortem* examination showed that his heart was atheromatous, but the medical evidence was that death was precipitated by the exertion of the work he was doing, as well as by the extraordinarily cramped position in which he was working. The Court (per *Sim, J.*) held that the case was indistinguishable from *Gibbs v. Thompson*(17), and the widow recovered
40 compensation. The next heart case arose in England in 1910 :

(13) [1903] A.C. 443, 446 ; 5 W.C.C. (15) (1907) 10 G.L.R. 150.
1, 3. (16) (1907) 10 G.L.R. 316.

(14) [1903] A.C. 443 ; 5 W.C.C. 1. (17) (1907) 10 G.L.R. 150.

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Clover, Clayton, and Co., Ltd. v. Hughes(18). That was the case of the man who was tightening a nut with a spanner when he collapsed and died owing to an aneurysm of the heart. It was in the course of his judgment in that case that *Lord Loreburn* laid down the test which has often been quoted: "In other words, 5
"did he die from the disease alone or from the disease and employ-
"ment taken together, looking at it broadly? Looking at it
"broadly, I say, and free from over-nice conjectures: Was it
"the disease that did it or did the work he was doing help in any
"material degree?" 10

Thus, it is now well settled that, should a man be injured or die while exerting himself in the course of his employment, the case is within the Act, and he or his dependant is entitled to compensation. Although this principle receives its most frequent illustration in cases under the Workers' Compensation Act, it seems 15
to me to be equally the position at common law. The reports contain many cases showing that the plaintiff in an action claiming damages for personal injury or death is not to be denied redress merely for the reason that the injury has been aggravated or death hastened by reason of congenital deficiency or the diseased 20
condition of the person injured or killed. "If a man is negligently run over or otherwise negligently injured in his body, "it is no answer to the sufferer's claim for damages that he "would have suffered less injury, or no injury at all, if he had "not had an unusually thin skull or an unusually weak heart": 25
per *Kennedy, J.*, in *Dulieu v. White and Sons*(19). In an action at common law, however, the Judge would doubtless direct the jury, and they would be entitled to estimate the extent to which the injury had been accelerated or death hastened by the accident, and such is the law in connection with a non-fatal case under the 30
Workers' Compensation Act. In a fatal case, the Workers' Compensation Act, on the other hand, ordains that, if the plaintiff succeeds, the amount of compensation prescribed by the statute must be paid.

Ordinarily, the onus of proving his case is on the plaintiff, 35
but where it is shown that death occurred while the worker was actually pursuing his employment, unless, indeed, the case falls within the class of which *Craske v. Wigan*(20) is an illustration, the onus is shifted, and it is then for the defence to prove that the deceased would have met his death at or about the same time 40
had he not been working: *Gibbs v. Thompson*(21). In the case

(18) [1910] A.C. 242; 3 B.W.C.C. (20) [1909] 2 K.B. 635; 2 B.W.C.C. 275.

(19) [1901] 2 K.B. 669, 679.

35.
(21) (1907) 10 G.L.R. 150, 152.

before me, inasmuch as Jarvis fell dead while he was at work, he certainly died in the course of his employment, and the one question for me to decide is whether he died as a result of an accident arising out of that employment.

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5 The case for the plaintiff appears to me beyond all question when we bear in mind that, save in the case of coronary thrombosis, effort is prejudicial in every form of heart disease. Even in a non-fatal case of coronary thrombosis, rest is imperative. I have already quoted Dr. Fitchett's view to this effect, as he expressed it in *Wynyard's* case(22), and I quote now the following from Levine's *Clinical Heart Disease*, at p. 288 (published as recently as 1936), under the heading "Rest in Bed":

15 The first principle in the treatment of such a case is rest in bed. Some patients, especially men, will rebel at what appears to them as such an extreme measure. He will plead to be permitted to cut down his work, to go in town for only one-half a day, or to remain at home resting or "taking it easy." It is best at the outset to explain that more will be accomplished in a shorter time if a strict regime is carried out. An effective argument is to emphasize that he will start feeling better more quickly and will lose less time from work 20 if he gives himself every advantage for recovery than if he goes at it half-heartedly. I have found it helpful to explain that with complete rest in bed the average heart saves about 25,000 beats each day as compared with being merely ambulatory, and it is this enforced rest to the heart which is so beneficial. The advice "to go to bed" often carries with it a grave 25 outlook in the mind of the patient. But he will have a better understanding of its significance and fear it less after a few days when he becomes aware of a distinct improvement. It is desirable to obtain as much mental and physical rest as possible, and for this at times it is wise to delay starting the entire course of treatment for a day or two so that the patient may take 30 care of certain matters that would otherwise prey on his mind.

This insistence on rest is surely another way of saying that effort is dangerous when a person has a diseased heart—the more advanced the disease the greater the danger, of course. Here, the *post mortem* findings disclosed advanced heart disease, and we 35 know from the evidence of the plaintiff and deceased's fellow-worker, Wall, that he was experiencing distress for some weeks before the catastrophe; indeed, that his mate did not allow him to use the heaviest hammer or push the wheelbarrow. Death came after the greater part of the working-day had passed, during 40 which he had been using a 16-lb. hammer in spawling stone, and we know that he died as he was using a 6-lb. hammer to strike the drill. Under these circumstances, the conclusion is irresistible that the end was hastened by the work he was doing.

In reference to the views, expressed by Drs. Gilmour and 45 Johnson, to the effect that there was no evidence to show that deceased had exerted himself during the day beyond the ordinary effort necessary for the work to which he had been accustomed,

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it seems to me clear that labouring men do not maintain a uniform effort throughout the day, but that at intervals they make efforts severer than the ordinary. Watch a man shovelling earth in a cutting or siding. While he is wielding the shovel he is exerting himself vigorously, but every now and then he will straighten himself to the upright position. He may even vary the work for a brief interval by scraping the mud from his shovel, or he may slake his thirst. He does this automatically, because, while he is working, nature gives the signal whenever he approaches the limit of his endurance-capacity. Exactly the same principle obtains in a football match. The player who makes a brilliant run or otherwise exerts himself violently does not do so continuously. Automatically, he slackens pace when he feels that he has gone far enough. If this is so with men in the best of health, it must have greater application in the case of men with damaged hearts or otherwise suffering from some physical disability. Accordingly, I think the following paragraph from Frazer's *Trauma, Disease, Compensation* (1929), p. 116, most appropriate :

MacKenzie points out that in the performance of its work there are periods when the heart has relatively little to do, while there are periods when it has to exercise its function to the fullest extent. During the latter periods the muscle requires a much greater amount of blood than during the periods of rest. To meet this varying demand the coronary arteries are made very distensible. The effect of atheroma or sclerosis of the artery tends to make of it a rigid tube, and the lumen of the artery may become reduced. It will thus be seen, he states, that diseased arteries, in preventing the increased flow of blood during effort, must lead to the impairment of the functional efficiency of the heart-muscle.

Further, it must be borne in mind that work, which appears to be comparatively easy to those engaged in it at the beginning of the day, becomes more laborious as the day advances and the body wearies. It is well known that the labourer is less efficient at the end of the day's work than he was at the beginning—that the last hour's work is the least productive—and this explains why Brassey, the great railway contractor, found that his British navvies were more efficient than continental men who worked longer hours. When men know the length of the day's work before them, they regulate their pace accordingly. In this connection, I have made a careful examination of the reported cases, both in the United Kingdom and in this country, in which heart disease was an element and in which the plaintiff succeeded, and I regard it as significant that in the majority of successful cases the fatality occurred in the afternoon, usually after the midday meal, and sometimes after the day's work had concluded. In *Whiteford v. The King*(23), for example, the accident occurred

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- after 2 p.m., and the medical witnesses attached importance to the fact that deceased had just had a full meal. In *Flanagan v. Ackers, Whitley, and Co.*(24) the deceased, a miner, complained of pain after he had helped to lift a derailed tub of coal. He continued working until the end of the shift, and had resumed work next day, but was ailing, and after the shift had concluded he was walking homeward, when he fell dead, owing, as the *post mortem* examination showed, to the bursting of the right auricle. In *Doughton v. A. Hickman and Co., Ltd.*(25), the *post mortem* examination showed that deceased had suffered from fatty degeneration of the heart. His work had been to load a truck with heavy sacks, and then to push each laden truck some distance on rails. After having pushed a truck, he rested and died soon afterwards. He had had his dinner, and had resumed work at 2 p.m. In *McArdle v. Swansea Harbour Trust*(26), deceased had worked during the forenoon, removing heavy cases. Having had his dinner, he resumed work handling lighter cases, and while so doing fell dead owing to the bursting of an aneurysm of the aorta. In *James v. Partridge Jones and John Paton, Ltd.*(27), deceased had suffered from disease of the coronary arteries. He had been engaged in the cleaning out of dross, which was heavy work. He sat down to rest, and within ten minutes was dead of angina pectoris. The death occurred at 12.30 p.m. In *Whittle v. Ebbw Vale Steel, Iron, and Coal Co., Ltd.*(28), deceased had been a grease-boiler whose duty it was to see to the fires, throwing out the ashes, and fetching coal. He had also to carry grease to the boiler, and, after it had been heated, to place it into frames to cool. Thereafter, he had to divide it into blocks, and carry these to a water-tank for further cooling. The cooling-process lasted three-quarters of an hour. His work necessitated a great deal of stooping, and the process of grease-boiling had to be repeated three or four times during the shift. He had complained to his panel doctor of pain in the region of the heart, and the doctor had advised him to stay away from work. After resting a few days he resumed work, and started at 7 o'clock on the evening shift. He was seen alive at 5.20 a.m., and twenty minutes later was found dead on the water-tank. Death was due to disease of the coronary arteries. In *Moore v. Tredegar Iron and Coal Co., Ltd.*(29), a collier left home to commence work one evening in good health. Having completed his shift, he was found unconscious after having

(24) (1926) 19 B.W.C.C. 399.

(25) (1913) 6 B.W.C.C. 77.

(26) (1915) 85 L.J.K.B. 783; 8 B.W.C.C. 489.

(27) (1933) 26 B.W.C.C. 277.

(28) [1936] 2 All E.R. 1221; 29 B.W.C.C. 179.

(29) (1938) 31 B.W.C.C. 359.

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walked 190 yards from his working-place on his way to the surface. He recovered and walked a short distance further, but collapsed again and died, the cause of death being heart disease. In one case, which I can recall, *Venning v. Westport Coal Co., Ltd.* (30), the worker commenced work at eight in the morning and fell dead while at work late in the afternoon.

Apart from the recitation of the foregoing cases, there is ample evidence to warrant judgment in favour of the plaintiff. They are interesting, however, and corroborative of her case. On the facts proved and on the authority of a long line of reported cases, I am bound to hold that Frederick Howard Jarvis, having met his death, as he did, while striking a drill with a 6-lb. hammer, died as a result of accident arising out of and in the course of his employment. It is now well settled that coronary thrombosis, in that effort is not the cause of its onset, cannot be an injury by accident. It appears not less clear that effort is a danger in every other kind of heart disease, and so nothing but the most convincing evidence would justify me in restricting further the ambit of liability.

The widow accordingly is entitled to succeed.

I award four years or 208 times the average weekly earnings of the deceased, totalling £970 13s. 4d. In addition, she is entitled to funeral expenses, £22 5s. 6d. I allow costs, £15 15s., and £2 2s. each for the four medical witnesses called on her behalf. Should the lay witnesses be entitled to their expenses, these shall be settled by the Clerk of Awards. The compensation will be paid to the Public Trustee, pending the further order of this Court.

Judgment accordingly.

Solicitors for the plaintiff: *F. H. Haigh* (Auckland).

Solicitors for the defendant: *Buddle, Richmond, and Buddle* (Auckland).

(30) Unreported.

[IN THE COMPENSATION COURT.]

WATSON v. NORTHCOTE BOROUGH.

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April 22, 30.

O'REGAN, J.

Workers' Compensation—Accident Arising out of and in the Course of Employment—Hernia—No Discomfort or Pain at Time of Special Effort—Continuation of Heavy Labour for Two Days afterwards—Subsequent Operation—Onus of Proof not discharged by Worker—Workers' Compensation Act, 1922, s. 3.

Where the onset of hernia is hastened by the effort of work, there must be some discomfort, if not pain, at the time of the effort.

A worker stripping soil and clay from a quarry site and wheeling the spoil some distance along planks in a wheelbarrow had to give a heavy pull to bring the barrow on to a plank from which it sank to the axle in the spoil. At the time he felt nothing, but about half an hour later he experienced a slight pain in the groin and rested for twenty minutes. He made no complaint to his fellow-workers at lunch, about an hour after the pull on the barrow. When he reached home he noticed a swelling where he had felt the pain. He worked the whole of the following day and until midday on the day after that, when he reported to the foreman. On examination, he was found to have a left inguinal hernia, and was operated on with success.

Held, That he had not discharged the burden of proof upon him, and that judgment must be for the defendant.

Fenton v. Thorley and Co., Ltd.(1), referred to.

(1) [1903] A.C. 443; 5 W.C.C. 1.

CLAIM FOR COMPENSATION under the Workers' Compensation Act, 1922.

The plaintiff, a labourer, aged thirty-nine years, alleged that he suffered an accidental injury arising out of and in the course of his employment on Wednesday, September 13, 1939—namely, a left inguinal hernia. The defence was that the hernial condition from which plaintiff suffered was not due to injury, but to causes purely congenital.

The facts sufficiently appear from the judgment.

- 10 *Goldstine*, for the defendant. The defence is that hernia was not caused by accident within the meaning of the statute, but was result of work involving strain performed over a period of time. The plaintiff cannot pin hernia to this particular strain on the particular day; hernia after this particular strain does
- 15 not necessarily indicate an accident. There must be a first occasion on which pain presents itself, whether it is due to particular strain or not, even in the case of herniae which are of gradual development. Plaintiff experienced the pain first, and seems

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to have looked for some strain that might have caused it and then decided that this was the particular one. Pain at the time of the happening as essential to prove the connection is clearly indicated by medical opinion and even by statements made by the Court of Arbitration: see the oral judgment of *Frazer, J.*, in *Timms v. Marlborough County Council*(1), in which he referred to the rules laid down by the Compensation Courts of the United States. These rules have been adopted by the Court of Arbitration: *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed. 656, states that they are applicable here. In the course of his judgment, His Honour says: "Dealing with these particular rules, there must be some complaint of pain and some temporary cessation of work"; see, hereon, the article by Dr. Mayers, of the Division of Industrial Hygiene, New York, in *Industrial Bulletin*, June, 1939, under the heading of "Mechanism of gradual production of hernia by successive strains," pp. 283-84, particularly para. 3; and the article on hernia by Dr. A. J. Trinca, M.D., F.R.C.S., Eng., issued by the Victorian Department of Accident Insurance.

In the United States accident is not necessarily required, and compensation for hernia is given if the circumstances connected with the production of the hernia are in accordance with the rules mentioned. Upon the question of immediate intense pain, see *Bruce v. Shire of Hampden*(2); and see *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed. 658, para. 2.

Haigh, for the plaintiff, did not address the Court.

Cur. adv. vult.

O'REGAN, J. The plaintiff stated that he was employed in stripping soil and clay from a quarry site. There were other men at work in the quarry itself, but they were below him and separated from him by the height of the quarry face, he alone being engaged in the work of stripping. He had to push the spoil some distance in a wheelbarrow—he says about 300 ft.—and a planked wheel-way extended the entire distance. For part of the distance the planks rested on the surface; but elsewhere they resembled a bridge, inasmuch as they were raised 7 ft. or 8 ft. from the ground, and this portion was three planks wide. At the point where the alleged accident occurred there was but a single plank. At about 11 a.m. the laden barrow slipped off the last plank, and the wheel sank to the axle in the spoil. Necessarily a heavy pull was required to bring the barrow on to the end of the second last

(1) Unreported: See *Marlborough Times* Newzp.: December 12, 1934.
(2) [1939] Arg. L.R. 500.

plank. He neither experienced pain nor discomfort, either in the act of exerting himself or immediately afterwards, but about half an hour later he experienced a slight pain in the groin, which necessitated his resting about twenty minutes. The pain, he says, continued for some time longer, but evidently it was never severe, inasmuch as when he had lunch with the other men, about noon, he made no complaint whatever. After getting home in the evening, when he was changing his clothing, he first noticed a swelling in the part where he had felt the pain. His evidence was that he resumed work next day, as usual, but was unable to carry on, and that at midday he reported to the foreman, who took particulars, and later in the day the plaintiff consulted Dr. Dudding. I am satisfied that he is a truthful witness, but it was established beyond question during the hearing that his recollection was at fault in that the alleged accident really occurred on Tuesday, September 12, 1939, not on the 13th, as alleged in the statement of claim, and that he worked the whole of the following day, and did not cease work until midday on the 14th. Thus, he worked forty-eight hours after the alleged accident.

The plaintiff gave the correct date to Dr. Dudding when he saw that gentleman at his surgery on the 14th. Dr. Dudding found a left inguinal hernia, prescribed the wearing of a truss in the meantime, but counselled the radical operation as early as possible. The operation was, in fact, performed at the Auckland Public Hospital on October 21, 1939, having been delayed for lack of accommodation there, and plaintiff made a good and uneventful recovery. Dr. Dudding gave a certificate after examining him on September 14, in which he expressed the opinion that the strain in pulling back the laden barrow, as described hereinbefore, was the exciting cause of the disablement. That view is confirmed by Mr. J. McMurray Cole, the surgeon who performed the operation. He agrees that the onset of the hernial condition is accompanied usually by pain, but is of opinion that there may be a small and painless protrusion only in the first instance, and that the same might well become enlarged shortly afterwards, when pain would be experienced. That is to say, the abdominal wall may be weakened by an effort, and thereafter gradually give way, and Mr. Cole thinks that such is the history of this case.

The plaintiff's case is supported also by Mr. G. D. Robb, surgeon, who made an examination on October 6, 1939. He heard the expert evidence hereinbefore reviewed, and expressed

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his agreement therewith. He withstood the ordeal of a searching cross-examination by Mr. Goldstine, in a manner indicating that he was able to give arguments in support of his view.

For the defence, Mr. Donald Dixon McKenzie, surgeon, who is on the staff of the Auckland Hospital, examined the plaintiff on April 16, 1940. The history of the case and a perusal of the post-operative findings satisfy him that it was a long-standing hernia, and he thinks there is an incipient hernia on the other side, though the plaintiff's witnesses were unable to find this. He holds—and in this connection there appears to be agreement—that all indirect inguinal herniae are primarily due to a congenital defect. In the great majority of cases these develop and ultimately become manifest owing to the cumulative effect of the intra-abdominal pressure inseparable from daily life and as age advances. He concedes that there are cases where effort induces a sudden onset, but these are invariably a minority, and he holds that there must be pain and such a "general upset" that the victim will be indisposed immediately the protrusion occurs. He does not deny that in this case such a heavy lift and pull as that described by plaintiff might cause a sudden onset, but he is of opinion that such is not the case here, first, for the reason that the sufferer felt no pain at the time of the lift, and, secondly, because he worked forty-eight hours after the alleged strain.

To the same effect is the evidence of another surgeon, Mr. Kenneth Mackenzie, who has been associated with the Auckland Hospital for twenty-six years. He heard the evidence and gave it as his view that, inasmuch as inguinal herniae are usually incidious and painless, there should be symptoms to mark the sudden onset where such occurs, and he admits that, in a limited class of case, it does occur. The following extract from *Saunders Medical Atlas by Golebiewski*, which is reprinted in *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed. 664, was put to the witness :—

To justify the payment of insurance the hernia must be developed suddenly and be accompanied by intense pain. The sudden development of a hernia invariably causes pain of a character so intense as to be almost unbearable, to which the affected individual involuntarily gives expression, and which obliges him to interrupt his work, and to consult a physician at once. If no proof of this kind is forthcoming, it is to be presumed that the work, during the performance of which the descent of the hernia occurs, furnishes the occasion for the same, but does not act as its cause, and is, therefore, to be regarded as the cause leading to the discovery of the condition, not as the cause of the hernia itself.

Mr. Mackenzie stated very frankly that, though he agreed that inguinal hernia may be due to a strain and in such event must develop suddenly, he could not agree that the pain must

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necessarily be severe, as alleged in the foregoing extract. He had never seen a case causing such really agonizing pain, though there may be severe pain. He was satisfied that in such a case there must be pain enough to make the patient aware at once
5 that something serious had occurred. Further, the discomfort or pain would not be spasmodic, but continuous, and he thinks that, as plaintiff in this case continued using a pick and shovel and wheeling a laden barrow a considerable distance for forty-eight hours after the alleged strain, it is conclusive as showing
10 that there was no sudden onset. Protrusion sufficient to be visible would be accompanied by some pain if it occurred suddenly.

It appears beyond question that, generally speaking, hernia is primarily due to a congenital defect—really a disease—of which the person so predisposed is usually unconscious until there
15 appears some exterior indication. In popular language the condition is called rupture, but this term is misleading in that it suggests or imports some tearing or laceration. It appears to be common ground that, apart from the rare cases due to visible and external violence, there is no tearing, but really an extension
20 by stretching of the imperfectly closed aperture in the abdominal wall. It appears that, during the greater part of the period of gestation, the testicles are in the abdomen of the male foetus. During the ninth month, they descend into the scrotum, passing through an opening in the abdominal wall, and this normally
25 closes before birth, leaving a line or "dimple" in the wall, but no structural weakness whatever. In a certain number of cases, however, usually about 10 per cent. of the male population, this opening does not close properly. In some the defect is greater than in others, but all people so afflicted will sooner or
30 later develop herniae—some early in life, some late, and some when they are very aged. Any effort involving intra-abdominal pressure, and presumably all effort does, may hasten the protrusion, and it sometimes occurs accordingly when the subject is lifting a weight or otherwise exerting himself. Of late years much has
35 been learned about hernia and the causes of its onset, and evidently research has been stimulated since the institution of workers' compensation for accidental injuries. It is now well established that hernia may be an injury by accident, but, inasmuch as it is not necessarily so caused, this type of case has
40 led to much litigation, and, as each case necessarily depends mainly on its own facts, the reported cases do not help very much. From an evidential point of view the ideal case was *Fenton v.*

There the plaintiff was exerting himself

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in the act of attempting to turn a wheel which had become clogged. While doing so, he collapsed owing to an inguinal hernia, and he was immediately disabled. His case was contested, not because the facts were denied, but for the reason that "accident" had previously been held to involve a disability due to some violent, visible, and external agency. The House of Lords held that there may be injury by accident by any unexpected or undesigned agency due to the employment, and without external violence or impact. 5

A hernia that runs its course and develops without strain of any kind may be quite painless, though the protrusion will ultimately cause discomfort enough to make the subject aware of it, and it may lead to other complications. It appears clear, however, that where the onset is hastened by effort, there must be pain, and the reported cases indicate that there is usually disablement at or about the same time. One has to read the reported cases with caution, for the reason that of late years stricter inquiries have been made, and it may well be that some of the earlier cases are no longer authoritative. 15

In view of Mr. Kenneth Mackenzie's evidence, that he had never experienced cases of pain so severe as that described in the paragraph from *Saunders Medical Atlas by Golebiewski*(2), the following extract from 6 *British Encyclopaedia of Medical Practice* (1937), 475, is interesting:— 20

As a rule hernia is associated with discomfort rather than pain, though colic and slight nausea often occur when the hernia is down. Sometimes the pain and discomfort are not referred to the hernia, but there is dragging pain about the umbilicus, or a pain in the back described as "lumbago." 25

That there must be some discomfort associated with the onset, however, appears conclusive from a perusal of many of the reported cases. It is always for the plaintiff to prove his case, and it would appear that the burden is more than usually onerous in hernia cases. Here, it is clear that the plaintiff did not suffer continuous pain in that he continued at heavy laborious work for two days after the incident, and was not laid aside until forty-eight hours had elapsed. That he did not experience pain until half an hour afterwards may well be due, as Mr. Cole has so well put it, to the fact that the protrusion augmented after the onset, but I must hold that the effort of heavy labour having been continued so long afterwards, coupled with the fact that plaintiff admittedly made no mention of what had occurred to his fellow-workers when they took their midday meal together one hour after the incident, is conclusive against his case. 30 35 40

Accordingly, judgment must be for the defendant, to whom leave is reserved to apply for costs.

Judgment for the defendant.

Solicitor for the plaintiff: *F. H. Haigh* (Auckland).

Solicitors for the defendant: *Goldstine, O'Donnell, and Wilson* (Auckland).

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[IN THE SUPREME COURT.]

BLENHEIM BOROUGH AND WAIRAU
RIVER BOARD *v.* BRITISH PAVEMENTS
(CANTERBURY), LIMITED.

S.C.
BLENHEIM.

1940.

March 5;
June 13.

SMITH, J.

Local Authorities—River Board—Contract—Removal of Shingle by Company for Road Works with consent of Board's Inspector in Public Interest—No Contract—Company bona fide Trespasser—Whether Action for Conversion lay—Damages—Basis for Assessment.

The plaintiffs joined in an action against the defendant, claiming (alternatively, separately, and together) damages for conversion by the removal of a quantity of shingle from the bed of the T. River. The legal relationship of the one plaintiff to the other in the control of the river was not in dispute between them; and, for the purposes of the action, the learned Judge held that the Borough Council was bound by the lawful acts of the River Board in controlling and protecting the bed of the river.

The defendant company wanted shingle for the purpose of road work in the neighbourhood. Its foreman saw the inspector of the River Board and obtained his permission to take the shingle without cost to the defendant from where the inspector wanted it removed for the purpose of eliminating a bend in the river. The removal was supervised or directed by the inspector and was in the public interest.

Held, 1. That there was no contract between the Board and the defendant for the removal of the shingle, which was taken without the legal authority of the Board.

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2. That the defendant was a trespasser which had acted *bona fide* in the belief that it had a right to do what it did.

Ashbury Railway Carriage and Iron Co., Ltd. v. Riche(1); *Macgregor v. Dover and Deal Railway Co.*(2); and *Gloucester County Bank v. Rudry Morthyr Steam and House Coal Colliery Co.*(3), applied.

3. That an action for conversion would lie.

Ahikouka River Board v. Wairarapa South County(4) applied.
Jones v. Gooday(5) referred to.

4. That the basis for assessment of damages was the same as in an action for the removal of minerals such as coal by unauthorized mining.

Wood v. Morewood(6) applied.

Hilton v. Woods(7); *Jegon v. Vivian*(8); *In re United Merthyr Collieries Co.*(9); *Livingstone v. Rawyards Coal Co.*(10); and *Glenwood Lumber Co., Ltd. v. Phillips*(11), referred to.

5. That, on either of the methods of assessment used in connection with that basis, there was no evidence on which damages could be assessed.

Judgment was therefore entered for the defendant company.

(1) (1873) L.R. 7 H.L. 653.

(7) (1867) L.R. 4 Eq. 432, 440, 441.

(2) (1852) 18 Q.B.D. 612, 631.

(8) (1871) L.R. 6 Ch. 742.

(3) [1895] 1 Ch. 629, 632.

(9) (1872) L.R. 15 Eq. 46.

(4) [1926] N.Z.L.R. 182; G.L.R. 1.

(10) (1880) 5 App. Cas. 25.

(5) (1842) 8 M. & W. 145; 151 E.R. 985.

(11) [1904] A.C. 405.

(6) (1841) 3 Q.B.D. 440, 441; 114 E.R.

575, 576.

ACTION, in which the Borough of Blenheim and the Wairau River Board joined as plaintiffs against the defendant company to claim damages for the removal of a quantity of shingle from the bed of the Taylor River.

Three causes of action were alternatively alleged.

5

On the first, the plaintiffs claimed that the Borough Council was the owner of parts of Sections 6, 8, and 28 in the District of Omaka, through which the Taylor River runs. They claimed that the River Board was the controlling authority of the Taylor River, and that the defendant took and removed from the said land 10,228 yards of shingle, the property of the Borough Council, and converted the same to its own use. On this cause of action, it was the Borough Council which claimed damages for conversion, amounting to £170 9s. 4d.

On the second cause of action, the plaintiffs repeated the allegations as to the ownership of the land and power of control, and then alleged that the bed of the Taylor River running through the aforesaid lands was vested in the River Board for the purposes of the River Boards Act, 1908. They, therefore, claimed that the shingle removed by the defendant was the joint property of the Borough Council and the River Board, and both claimed damages for conversion.

20

On the third cause of action, the plaintiffs repeated the allegation as to ownership of the land, but said that the bed of the river was vested in the plaintiff Board for the purposes of the Act. On this cause of action the River Board alone claimed
5 damages for conversion.

The defendant company made a general denial of the allegations of the plaintiffs, and pleaded as an affirmative defence that, in carrying out any works on the land in question, it did so lawfully and by the leave and license and under the direction of
10 the River Board in pursuance of the purposes of the Board in straightening, controlling, or improving the course of the Taylor River, and upon conditions not requiring any payment by the defendant company to either of the plaintiffs. The defendant also pleaded that neither of the plaintiffs had suffered any loss
15 or damage.

Nathan, for the plaintiffs. The right of the River Board is in the nature of an easement: *Kingdon v. Hutt River Board*(1). Subject to this, the owner has full rights, save that he may not remove shingle without the consent of the Board: Public Works
20 Act, 1928, s. 202. [Evidence was then called.]

Brassington, for the defendant company, moved for judgment as against the two plaintiffs, on the grounds that, as to the River Board, there was no evidence to support any claim for damages; and, as to the Borough, the defendant company was excused by
25 consent: see *Ahikouka River Board v. Wairarapa South County*(2). The River Board cannot recover damages for conversion. The plaintiffs had sued in conversion instead of trespass; here, the measure of damage would be the difference in value between the land before and after the damage: cf. *Bullen*
30 *and Leake's Precedents of Pleading*, 9th Ed. 350.

Nathan, for the plaintiffs, to oppose. It is admitted that the River Board has control, but the owner is entitled to shingle at all times and to remove it if the River Board consents: *Johnston and Sons, Ltd. v. Waikivi River Board*(3). A River
35 Board has power only to do what is necessary, as distinct from what is advisable. [The Court decided to hear the whole case, and the evidence was proceeded with.]

(1) (1904) 25 N.Z.L.R. 145; 7 (2) [1926] N.Z.L.R. 182, 187; G.L.R. 634.

G.L.R. 1, 4.

(3) [1923] N.Z.L.R. 9; G.L.R. 26.

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Brassington, for the defendant company. The claim is disputed partly on account of public policy. On the facts, the River Board gave authority; and, therefore, there is no evidence justifying damages for the River Board.

As to the borough, (a) the facts show that the borough has not in the past charged royalties; (b) the proper claim is one for trespass; (c) the sole remedy is damages for injury to reversionary interest because there is a tenant in possession: see cl. 9 of the lease; and (d) if the remedy is conversion of chattels, the action should be by the tenant, because the tenant has the whole possession: see 7 *Holdsworth's History of English Law*, 418. 5 10

The true principle of damages is given in *Jones v. Gooday*(4): see *Higgon v. Mortimer*(5); and *Mayne on Damages*, 10th Ed. 424. If there were a trespass, then damages can only be nominal and at most only compensatory of actual loss. The defendant company did everything normally done, but it did not suspect the borough was the owner: see the various Proclamations relating to the land; River Boards Act, 1908, s. 75; *Attorney-General v. Wairau River Board*(6); *Hawke's Bay River Board v. Thompson*(7); and *Gray v. Urquhart*(8). The only proper way of defining the title of the River Board is to say that it is an easement in gross. It is admitted that the right to take shingle is a *profit à prendre*, and is not a mere right of acquisition by custom or prescription. 15 20

Nathan, in reply. It is within the contemplation of the law (statutes and Proclamations dealing with the land) that the gravel is severable, and is paid for as such. An action in trover and detainee lies for fixtures after severance: 33 *Halsbury's Laws of England*, 2nd Ed. 51, 52 (p). Shingle is dealt with in commerce, and therefore can be the subject of conversion. The reservation made in the tenancy gives the borough a right to sue for shingle removed without the borough's authority. 25 30

Kingdon v. Hutt River Board(9) shows that the right given to a River Board is only a right to exercise its powers itself. A contractor has no right in the materials removed from the bed: *Johnston and Sons, Ltd. v. Waikiki River Board*(10). Section 201 of the Public Works Act, 1928, therefore does not authorize the 35

(4) (1842) 9 M. & W. 736; 152 E.R. 311. (7) [1916] N.Z.L.R. 1198; [1917] G.L.R. 14.

(5) (1834) 6 C. & P. 616; 172 E.R. 1389. (8) (1910) 30 N.Z.L.R. 303; 13 G.L.R. 406, 408.

(6) [1930] N.Z.L.R. 841, 842, 854; G.L.R. 279, 280, 447, 452. (9) (1904) 25 N.Z.L.R. 145; 7 G.L.R. 634.

(10) [1923] N.Z.L.R. 9; G.L.R. 26.

taking. Disposal must form part of a River Board's ordinary functions, but this only if it authorizes the removal for its own purposes.

Cur. adv. vult.

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- 5 SMITH, J. The Borough Council rests its title to the land on two Proclamations. One part of the land, coloured green on the plan put in evidence, was comprised in a Proclamation made under the Public Works Act, 1894: see 1897 *New Zealand Gazette*, 1983, 1984. Pursuant to s. 18 of the Public Works Act, 1894,
- 10 the effect of the Proclamation was to vest the land taken absolutely in fee-simple in the Blenheim Borough Council, discharged from all mortgages, charges, claims, estates, or interests of whatever kind for the public use named in the Proclamation—viz., “river-protection works.” This Proclamation was registered
- 15 in the Land Transfer Office.

- The remaining part of the land is coloured red on the plan. This land was first dealt with under Part VIII of the Land Act, 1892, dealing with reserves. Under s. 235 the Governor had power to reserve from sale temporarily any Crown lands required
- 20 for certain purposes, including “the improvement and protection “of rivers.” The land coloured red was temporarily reserved under this power, and then pursuant to the powers conferred by s. 236 of the Act by notice dated November 26, 1898, permanently reserved by the publication of a notice in the *New Zealand Gazette*:
- 25 see 1898 *New Zealand Gazette*, 1948, 1949. The purpose for which the land was expressed to be reserved was “river protection.” The effect of this notice is expressed by s. 237 of the Land Act, 1892. The land became dedicated to the purpose for which it was reserved, and it could at any time thereafter be granted for
- 30 such purpose in fee-simple or disposed of in any other manner as for the public interest might seem best, subject to the condition that it should be held in trust for the purpose for which it was reserved, unless such purpose was lawfully changed. Pursuant to this power and to s. 4 of the Public Reserves Act, 1881,
- 35 this permanent reserve was vested in the Corporation of the Town of Blenheim “in trust for river-protection purposes.” This was done by Order in Council dated April 25, 1899 (1899 *New Zealand Gazette*, 855, 856). This grant was not registered under the Land Transfer Act pursuant to the power conferred by s. 11 (ff) of the
- 40 Act of 1881, but that power was permissive. Under s. 20 of the Public Reserves Act, 1881, and the following sections, the local body had power to lease the land and the Borough Council has

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leased this land. No contention has been put forward that subsequent statutory provisions have altered the rights of the borough. Subject to the matter of the relationship of the Borough Council to the River Board, with which I am about to deal for the purposes of this action, the land must be taken to have remained vested in the Borough Council in trust for river-protection purposes and to be subject to the statutory powers of leasing. Part of the land is at present leased from year to year. 5

There are statements in the judgments in *Attorney-General v. Wairau River Board*(1), to which I have been referred by counsel for the defendant, which show that from about the year 1890 onwards various River Boards maintained protective works in the Wairau District, but there is no evidence before me to show whether at the time the land now in question was vested in the Blenheim Borough Council there was also a River Board exercising jurisdiction over the same land. Whether there was or not, it is clear that in the years 1921 and 1922 various River Boards which carried out river-protection work in the Wairau Plain were united in the Wairau River Board by Orders in Council made pursuant to the River Boards Act, 1908, and its amendments: see 1921 *New Zealand Gazette*, 1691, 1692, 1693, and 1922 *New Zealand Gazette*, 1636, 1637. The whole of the land now in question was included in the district of the Wairau River Board. Under the Order in Council of 1922, the Borough of Blenheim was created a subdivision of the Wairau River District. The effect of this was to give the Borough certain powers of voting for the members of the Wairau River Board: see s. 6 (ff) of the River Boards Act, 1908, and *Attorney-General v. Hutt River Board*(2). 10 15 20 25

The relationship of the borough to the Wairau River Board in the control of the river since the year 1922 has not been set before the Court in detail. This was no doubt considered unnecessary, as the plaintiffs allege on their first cause of action that, though the Borough Council is the owner of the lands through which the Taylor River runs, the River Board is the controlling authority of the Taylor River. On their second and third causes of action, they also allege that, though the plaintiff is the owner of the lands through which the Taylor River runs, the bed of the Taylor River is vested in the River Board for the purposes of the River Boards Act, 1908. These pleadings render it unnecessary for me to consider the legal relationship of the one plaintiff to the other in the control of the river. Indeed, if the parties were at issue upon that relationship, I do not think it would be proper 30 35 40

(1) [1930] N.Z.L.R. 841, 842, 854; (2) (1899) 18 N.Z.L.R. 162.
G.L.R. 279, 280, 447, 452.

that the question should be litigated in this action between the two parties as joint plaintiffs. If the relationship were in dispute, it should be litigated between the Borough Council and the River Board as opposing parties. For the purposes of this action, then, I must hold that the Borough Council is bound by the lawful acts of the River Board in controlling and protecting the bed of the Taylor River.

The next question is whether the River Board ever authorized the defendant company to take the shingle in a manner legally binding upon the River Board. On the facts, I find that the defendant company's foreman, Mr. McKee, telephoned to the inspector of the Wairau River Board, Mr. Marshall, early in December, 1938, asking permission to obtain shingle from the Taylor River-bed. It is in dispute whether the defendant company had actually started to take shingle from the river-bed before or after this conversation. The evidence of the defendant's foreman, Mr. McKee, is precise, and I think that permission was obtained from the inspector before the defendant's excavator arrived. In any event, it is clear that the conversation occurred about the beginning of operations, and also that on the morning after it occurred the inspector met the foreman at the river-bed. The defendant company wanted the shingle for the purpose of road works for which it had contracted in the neighbourhood. The inspector saw the advantage of having a nasty bend in the river removed, and he told the foreman that if the defendant company would take the metal from where the inspector wanted it removed it would cost the company nothing. This meant that no royalties would be claimed. The inspector then took the foreman down stream, instead of up stream where the foreman wished to go, and the company took the metal from where it was directed by the inspector, who was thereafter frequently on the job supervising and directing. Some of the shingle which was taken, though in the bed of the river, had grass growing on it. This land was included in the land leased by the borough from year to year. The lease includes a provision enabling the Borough Council or its agents to enter at all times to make or repair any river-protective works on the lands leased or adjacent thereto.

I accept the evidence that the removal of the bend as directed by the River Board's inspector has much improved the river for the purposes of river protection. The inspector himself says that the removal of the gravel was definitely in the public interest. There can be no doubt that, if the River Board is bound by the actions of its inspector, the River Board can make no claim against

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the defendant company in respect of the shingle removed by it, and the Borough Council, as I have stated, would be bound by the actions of the River Board.

Upon my view of the evidence, it would be a hardship on the defendant company to hold that it took the shingle without the lawful authority of the River Board. Yet my opinion is that it did so. The River Board is a statutory corporation created for specific purposes. Its powers are limited and circumscribed by the statute creating it. What is not expressly or impliedly authorized is to be taken as prohibited: *Ashbury Railway Carriage and Iron Co., Ltd. v. Richie*(3); and see also 8 *Halsbury's Laws of England*, 2nd Ed. 72. By s. 67 of the River Boards Act, 1908, the Board has power to contract with any person for doing anything which the Board is authorized to do by any statute or which is necessary for the purposes of the River Boards Act. Sections 68 and 69 determine the way in which the Board may enter into contracts. It has not been suggested by any party that there was any contract between the Board and the defendant company, and I think the assumption that there was no contract is correct. There was no contract in writing, and, if it were suggested that the inspector made a verbal contract on behalf of the Board for a sum not exceeding £20, the suggestion would not be tenable because, apart from the question of the value of the contract, a verbal contract must be made either by the chairman or by any two members of the Board on behalf and by direction of the Board. I conclude, therefore, that there was no contract between the River Board and the defendant company for the removal of the shingle.

The other method available to the Board for carrying out its duties is the performance of work by itself, its servants, or workmen. The defendant company was not a servant of the Board. It must follow that although the inspector gave directions to the defendant company as to where it was to take the shingle, the company took the shingle without the legal authority of the Board. The defendant cannot in law complain of this, because, where a corporation is constituted by a public Act of Parliament, all persons are presumed to know the nature and extent of its powers: *Macgregor v. Dover and Deal Railway Co.*(4) and *Gloucester County Bank v. Rudry Morthyr Steam and House Coal Colliery Co.*(5). The River Board is in law entitled to say that notwithstanding the action of its inspector it is not bound by his action. The River

(3) (1873) L.R. 7 H.L. 653.

(4) (1852) 18 Q.B.D. 612, 631.

(5) [1895] 1 Ch. 629, 632.

Board has said this and has repudiated its inspector by joining with the Borough Council in this proceeding, and its claim and the claim of the Borough Council must be considered upon their legal merits.

- 5 A material question is whether the defendant company acted *bona fide*. In my view, it plainly did. Although the inspector could not in law bind the River Board, the authority which he purported to give is relevant to the question of the defendant's good faith. On the evidence, I find that the defendant had no
- 10 knowledge of any claims by the Borough Council in respect of the river-bed, and that it considered, through its responsible officers, that it had obtained proper authority to do what it did from the only controlling body of which it had knowledge. The company was therefore in the position of a trespasser who acted fairly and
- 15 honestly in the full belief that he had a right to do what he did.

- The remedies available against such a person vary according to the legal interest of the plaintiff. The person entitled to possession may sue in trespass, and the person entitled to a reversionary interest may sue for damages to that interest. In
- 20 the present case, neither plaintiff claims any such remedy. Thus, any claim which the Borough Council might have for damage to its reversionary interest in the land leased, some of which was in poor grass, does not arise. Each plaintiff claims, either separately or jointly, for damages for conversion of the shingle. That is a
- 25 claim in respect of goods, though the goods were created and obtained by excavating land. Mr. *Brassington* contended that, if any remedy existed, trespass was the only remedy, and he relied on the case of *Jones v. Gooday*(6) as showing that the proper measure of damages was the value to the plaintiff of the land
- 30 removed, not the expense of restoring it to its original condition. I think, however, that an action for damages for conversion would lie. A possessory title is sufficient to support such an action. In *Ahikouka River Board v. Wairarapa South County*(7), *Ostler, J.*, held that a River Board has sufficient property in the shingle in
- 35 that part of the river-bed within its boundary to be able to recover damages for its conversion. In the present case, it is sufficient for me to say that one or other of the plaintiffs must have, as against the defendant company, a right to the possession of the shingle.

- 40 The basis for the assessment of damages for the removal of such shingle seems to me to be the same as in an action for the

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(6) (1842) 8 M. & W. 145; 151 (7) [1926] N.Z.L.R. 182; G.L.R. 1. E.R. 985.

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removal of minerals such as coal by unauthorized mining. In such cases, a clear distinction is drawn between a defendant who is a mere wrongdoer and one who has acted *bona fide* in the belief that he was entitled to do what he did. This distinction was first made by *Parke, B.*, in *Wood v. Morewood*(8), where he distinguished his own ruling in *Martin v. Porter*(9). The distinction so made has been followed in subsequent cases, which are collected in *Mayne on Damages*, 10th Ed. 379 (ff), and I need refer only to *Hilton v. Woods*(10); *Jegon v. Vivian*(11); *In re United Merthyr Collieries Co.*(12); *Livingstone v. Rawyards Coal Co.*(13); 10 and *Glenwood Lumber Co., Ltd. v. Phillips*(14). One way of stating the principle so established is that the plaintiff is only to recover against a person trespassing in good faith what would have been a fair price if the wrongdoer had bought the coal while it was yet a portion of the land just as you would buy it if you were buying a coalfield. That means that a purchaser in assessing what he would give for the coal would take into account his costs of severance and probably his profit: see *Mayne on Damages*, 10th Ed. 381. On such a basis a royalty could be assessed. Another way of stating the principle is that the *bona fide* trespasser must pay the market value at the pit's mouth, less actual disbursements for severing and bringing it to bank. This would place the owner in the same position as if he had himself severed and raised the coal. The difference between the two methods of assessment is that one allows for a reasonable profit and the other does not.

In this case, I do not need to decide which of these methods would represent the appropriate measure of damages, because there is no evidence upon which damages can be assessed in favour of either plaintiffs upon either basis. There is no evidence at all to assess the damages upon the basis of the value of the shingle less costs of severing and removing it. There is no sufficient evidence as to what royalty could have been reasonably obtained for the removal of this particular shingle. The clerk to the River Board gave evidence that in some cases for similar shingle per yard was charged. He said that in other cases the Board is glad to get rid of the shingle. There was one such case where they charged only a penny and another such case in which they did not charge at all. The Board's inspector apparently thought

(8) (1841) 3 Q.B. 440, 441; 114 (11) (1872) L.R. 15 Eq. 46.
E.R. 575, 576. (12) (1871) L.R. 6 Ch. 742.

(9) (1839) 5 M. & W. 352; 151 (13) (1880) 5 App. Cas. 25.
E.R. 149. (14) [1904] A.C. 405.

(10) (1867) L.R. 4 Eq. 432, 440, 441.

that the removal of this particular shingle without the payment of any royalty was an adequate consideration for the advantage the Board would get in the improvement of the river-bed for its purposes. Accordingly there is no evidence upon which damages
5 can be assessed.

Counsel for the plaintiff explained that the action had been brought largely for the purpose of having the legal position cleared up. I do not think it desirable, however, that I should attempt to go beyond the conclusion which I have reached on the
10 pleadings and on the facts in this action. In my opinion, the proper course to take to give effect to that conclusion is to enter judgment for the defendant company, but without costs to any party.

Judgment accordingly.

Solicitor for the plaintiff: *A. C. Nathan* (Blenheim).

Solicitor for the defendant company: *A. C. Brassington* (Christchurch).

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Public Works—Compensation—Notice that Claim not Admitted—Jurisdiction—Power of Court before or after Filing of Claim to allow further Time to give Notice of Non-admission of Claim—Public Works Act, 1928, s. 53.

Section 53 (b) of the Public Works Act, 1928, gives the Court power, either before or after the claim has been filed in accordance with s. 53 (a), to allow further time within which the respondent may give the notice referred to in the section that it does not admit the claimant's claim.

MOTION by the respondent for an order granting it further time in which to give notice of non-admission of claim.

This was a claim under the Public Works Act, 1928, made by the claimant on December 18, 1939. Section 53 of the Public Works Act, 1928, provides for a notice in writing to the claimant by the respondent within sixty days after receiving the claim that it does not admit the claim. The requisite notice was not given to claimant until May 20, 1940, although in the meantime negotiations for settlement had been entered into by the parties. 5

Respondent alleged that, during the course of the negotiations, claimant stated that in the event of a permit being granted allowing him to rebuild an office on his property contrary to the provisions of the town-planning scheme, out of the operation of which the claim arose, he would withdraw his claim for compensation. Claimant denied this allegation. 10 15

On March 12 claimant instructed his solicitor to file his claim pursuant to the provisions of s. 53, and he was subsequently advised that, in the event of his claim being filed, respondent proposed to apply for leave to set aside the award, and requested that the filing of the claim be postponed. Claimant postponed filing the claim accordingly. 20

Respondent applied to the Court for an order granting it further time within which it might give a notice of non-admission of claim to claimant.

Biss, for the claimant, to oppose. The claimant has done all that he is required to do under the Act. He is not obliged immediately to file his claim in the Supreme Court, and thus give it the effect of an award, if the respondent does not within sixty 25

days after receiving the claim give notice of non-admission: see s. 53 (a) of the Public Works Act, 1927. Upon the filing of the claim, it has the effect of an award "unless the filing thereof is "set aside, as hereinafter provided."

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5 Section 53 (b) is available to a respondent only when a claimant has exercised his right under s. 53 (a). The powers given to the Court by s. 53 (b) are cumulative, not alternative. These powers are: (a) To set aside the filing of the claim; (b) if necessary, to stay or set aside any proceedings subsequent to the
10 filing of the claim; and (c) to allow further time to the respondent to give notice of non-admission. If these powers were given to the Court in the alternative, and the Court exercised only the first of them—that is, set aside the filing of the claim—the claimant would be without a remedy, even though he had done everything
15 which the Act requires him to do, because under s. 54, a claimant cannot file his notice that he requires his claim heard by a Compensation Court until the respondent has given his notice of non-admission of the claim. If the Court exercises its power under s. 53 (b) and sets aside the filing of the claim, it must of
20 necessity appoint a time within which the respondent is to file notice of non-admission, otherwise grave injustice would be done to a claimant who had been guilty of no negligence or default.

In *Donald v. Mayor, &c., of Masterton*(1), the claim had already
25 respondent is premature.

In any event, the Court should not in this case exercise its discretion in favour of the respondent. Its neglect has caused the present position to arise. As shown by the affidavits, negotiations are being conducted in an endeavour to settle the
30 claim. Such being the case, the respondent should not be armed with an order on this motion, which must prejudice the claimant in the negotiations. The Court has a discretion under s. 53 (b). The respondent can always renew the present application if and when the claimant files his claim.

35 *O'Shea*, for the respondent, in support. The powers contained in s. 53 of the Public Works Act, 1928, are distinct and separate. Paragraphs (a) and (b) must be read independently, and para. (b) must be split up into two parts, as follows: (i) The Supreme
40 Court may, if it appears reasonable to do so, and on such terms as to costs and otherwise as the Court deems just, set aside the filing of the claim and if necessary stay or set aside any

(1) [1921] G.L.R. 12.

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proceedings subsequent to the filing of the claim ; and (ii) the Supreme Court may allow further time within which the respondent, if it appears reasonable so to do and on such terms as to costs or otherwise as the Court deems just, may give the notice referred to in this section. These two parts must be read separately, because the word "may" is not repeated before the words "stay" or "set aside." The notice of non-admission should be served and filed, and at the same time proceedings for extending the time for serving the notice of non-admission should be filed. If the notice of non-admission previously served is held by the Court to be unauthorized, it will be merely a nullity and a further notice of non-admission can be filed. The section can be read in such a way as to give the Corporation relief before the claim is filed. Therefore, that course should be adopted, because, if the statute is so interpreted, the evil that existed would be more effectively and expeditiously got rid of : see *Donald v. Mayor, &c., of Masterton*(2), where it is shown that the claimant's solicitors should have intimated to the Council that it would file a claim unless a notice of non-admission were filed.

The amendment of 1909 was passed in consequence of the result of *Lloyd v. Mayor, &c., of Wellington, Johnston v. Same*(3) ; and effect was given by the Legislature to the interpretation by *Edwards, J.*(4), of s. 44 of the Public Works Act, 1894 (reproduced in s. 45 of the Public Works Act, 1908) (*Puhoi Road Board v. Straka*(5) was referred to)(6). Although the Court came to the right decision, the claimant had merely a right to require his claim to be heard ; the order of the Court affected that, but the statute could not go further under any interpretation. On appeal, in *Wellington City Corporation v. Lloyd, Same v. Johnston*(7), the Privy Council indicated that probably the statement of the learned Judge went too far when he referred to an abuse of the process of Court(8) ; but it can be clearly said that the property owners exercised their rights to the limit.

Therefore, in view of the wording of the statute of 1909, and a comparison of it with the wording of the motion(9), it follows that the filing of the present claim in the Supreme Court should be ordered to be set aside, and the parties should be allowed to proceed as though the notice that the claim is not admitted were duly given as at the date of the order setting aside the filing, when

(2) [1921] G.L.R. 12, 13.

(3) (1901) 19 N.Z.L.R. 733, 762, 768, 769.

(4) *Ibid.*, 762.

(5) (1888) 6 N.Z.L.R. 574.

(6) (1901) 19 N.Z.L.R. 733, 768.

(7) [1902] A.C. 396, 401, 402 ; N.Z.P.C.C. 644, 647.

(8) (1901) 19 N.Z.L.R. 733, 768, 769.

(9) *Ibid.*, 735.

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it was actually contemplated by the Legislature that the order proposed by *Edwards, J.*, in *Lloyd's case*(10), could and should be made in circumstances such as these. This takes into account what the law would have been had the amendment made in 1909 then been in force. When the condition precedent fixed by the statute has not been complied with, the Court is powerless(11). In view of the judgment in *Wellington City Corporation v. Johnston, Same v. Lloyd*(12), if the present law had then been in existence, the result would have been the other way.

- 10 OSTLER, J. (orally). In the circumstances of this case, had the claim been already filed and become an award, there can be no doubt that the Court would not only have set aside the award, but would have extended the time for giving the notice, for after the claim was filed there were two sets of negotiations put in hand, 15 either of which had it been successful would have disposed of the claim. Those negotiations took some time, and, in my opinion, constituted a valid excuse for the failure of the respondents to give the notice in time. Equitable grounds have therefore been established for the making of the order asked for if the Court has 20 power to make it, but it is contended that there is no such jurisdiction.

I am a firm believer of the old legal maxim *Boni judicis est ampliare jurisdictionem*, which is peculiarly applicable to the circumstances of this case. It is contended on behalf of the 25 claimant that the Court has no jurisdiction to allow further time within which respondent may give the notice referred to in the section that it does not admit the claim until claimant has actually filed a copy of the claim under s. 53 (a) of the Public Works Act, 1928. That paragraph reads as follows :—

- 30 At any time after the expiration of the said sixty days the claimant may file a copy of his claim, together with the receipt for the service thereof, in the Supreme Court; and thereupon the claim, unless the filing thereof is set aside as hereinafter provided, shall have the effect of an award filed in the Supreme Court, and may be enforced in manner provided in section 35 ninety hereof.

Then comes s. 53 (b), in the following words :—

- On the application of the respondent the Supreme Court may if it appears reasonable so to do, and on such terms as to costs and otherwise as the Court deems just, set aside the filing of the claim, and if necessary 40 stay or set aside any proceedings subsequent to the filing of the claim, and may allow further time within which the respondent may give the notice referred to in this section.

The matter is not as clear as it might be, but, in my opinion, the provision in the last two lines of s. 53 (b) gives the Court power

(10) *Ibid.*, 768.
(11) *Ibid.*, 755.

(12) [1902] A.C. 396; N.Z.P.C.C.
644, 647.

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to allow further time within which the respondent may give the notice, either before the claim has been filed or after. The wording of s. 53 (b) is wide enough to cover both cases. The first part of the paragraph deals with the case where the claim has actually been filed. The rest of the section gives a separate power to the Court, whether the claim has been filed or not, to allow further time within which the respondent may give the notice that it does not admit the claim. It will be noticed that the word "may" is repeated a second time. This would have been unnecessary had the Legislature intended that the power of allowing further time should only be exercisable on an application made after the claim had been filed. I admit that the matter is not free from doubt, but, in my opinion, the Legislature intended the Court to have the power to allow further time within which the respondent may give the notice referred to before or after the claimant's claim has been filed in accordance with s. 53 (a). 5 10 15

An order will be made extending the time within which the notice of non-admission may be made to June 7, 1940. As the respondents are in default, they will have to pay the costs of the motion, which I fix at £5 5s. and disbursements. 20

Order accordingly.

Solicitors for the claimant: *Gawith, Biss, and Griffiths* (Wellington).

Solicitor for the respondents: *City Solicitor* (Wellington).

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SCHOOL AND JOHN DUTHIE AND
COMPANY, LIMITED.

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June 23,
July 25.

MYERS, C.J.

Local Authorities—Public Bodies' Leases—Perpetual Right of Renewal—Rent for Renewed Lease determined by Valuation—Reasonable Cost thereof to be paid by Lessee pursuant to Statute—Provision declared Void by subsequent Statute—Whether Valuation an Arbitration "under any other Act"—Public Bodies' Leases Act, 1908, s. 5 (e), First Schedule, Cls. 8, 14—Arbitration Act, 1908, s. 2—Arbitration Amendment Act, 1938, ss. 14 (1), 20.

A lease, with a perpetual right of renewal granted pursuant to the powers contained in the Public Bodies' Leases Act, 1908, provided for the lessees' rights of renewal on the terms set out in the lease, being the terms prescribed by the First Schedule of the Act, the rent to be determined by valuation. One of the terms prescribed by that Schedule, and contained in the lease, was as follows: "the reasonable cost of any "such valuation as aforesaid shall be borne by the lessee"; and another prescribed term was that the provisions for the making of a valuation should be deemed to be a submission to arbitration under and within the meaning of the Arbitration Act, 1908.

For the purpose of determining the rental for a new term, the parties appointed arbitrators, who appointed an umpire. The arbitrators having disagreed, the umpire made a valuation and, *inter alia*, awarded that the costs should be borne as to one-third by the lessor and as to two-thirds by the lessee.

On a motion to set aside the award or remit it back to the umpire so far as costs were concerned, on the ground that it was erroneous in law,

Held, dismissing the motion, That the provision as to costs was part of the submission and the arbitration was an arbitration under the Arbitration Act, 1908, and not "under any other Act" within the meaning of that phrase in s. 20 of the Arbitration Amendment Act, 1938; and that, therefore, s. 14 (1) of the Arbitration Amendment Act, 1938, applied.

Hamill v. Wellington Diocesan Board of Trustees (1) referred to.

(1) [1927] G.L.R. 197.

MOTION to set aside an award or to remit it back in part to the umpire, the matter in question arising by reason of the Arbitration Amendment Act, 1938.

The Wellington College Governors, by lease dated February 12,
5 1919, and memorandum of lease of the same date, leased to John
Duthie and Co., Ltd., certain parcels of land in Wellington for the
term of twenty-one years from January 1, 1919 (with a perpetual
right of renewal), upon the terms and at the rentals set out in the
documents. The leases were granted by the Governors pursuant
10 to the powers contained in the Public Bodies' Leases Act, 1908

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(the Governors having been declared a leasing authority under that Act by an Order in Council dated June 13, 1910), and provided for the lessee's right of renewal in the terms set out at length in the leases, such terms being the terms prescribed by the First Schedule to the Act. For the purpose of determining the rental for the new term to commence on January 1, 1940, the parties appointed arbitrators, who appointed Mr. W. H. Cunningham, of Wellington, barrister, as umpire.

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One of the terms prescribed by the First Schedule to the Public Bodies' Leases Act, 1908, and contained in the leases executed by the parties was as follows: "The reasonable cost of any such valuation as aforesaid shall be borne by the lessee."

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The arbitrators having disagreed, the umpire made a valuation, and, on the question of the fees of the arbitrators and umpire and the costs of preparing and stamping the award, awarded that the same should be borne one-third by the lessor and two-thirds by the lessee.

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The lessor now moved to set aside the award or remit it back to the umpire in so far as it purported to award or order that any proportion of the fees of the arbitrators and umpire and the costs of preparing and stamping the award be paid by the lessor, upon the ground that so far as that aspect of the case was concerned the award was erroneous in law and exceeded the terms of the reference.

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Powles, for the Wellington College Governors, in support. A. The provision in the Schedule to the Public Bodies' Leases Act, 1908, are in the circumstances mandatory on the leasing authority. The College Governors have no power other than by this statute to grant perpetually renewable leases: Public Bodies' Leases Act, 1908, s. 5 (e), First Schedule. The word "may" in the phrase "a lease may contain," &c., is mandatory.

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B. The provision in the Schedule is an independent stipulation and is no part of the submission, and is therefore not caught by s. 14 of the Arbitration Amendment Act, 1938. Clause 14 deals with costs, but this is no part of the submission; it is an independent agreement: see s. 14 of the Arbitration Amendment Act, 1938 ("any provision in a submission"). All that the arbitrators can do is to fix the costs but not their incidence, which is fixed by the statute. In the Second Schedule to the Public Bodies' Leases Act, 1908, there is no provision for costs, though there is a similar provision for valuation (cl. (6)), so that the question of costs is open.

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- C. If such provision is not an independent stipulation, then the valuation of the rent is an arbitration under another Act and as such comes within the exception clause of s. 20 of the Act of 1938 : cf. Arbitration Act, 1934 (24 & 25 Geo. 5, c. 14), s. 20 (27 *Halsbury's Complete Statutes of England*, 27). As to what is "an arbitration under any other Act" within s. 20 of the Arbitration Amendment Act, 1938 : In England there are a number of other Acts each one of which is a code in itself for arbitration, but only brought under the Arbitration Act by s. 20 : *Hogg on Arbitration*, 219. In New Zealand there is no "other" Act similar to any of the "other" Acts in England, and amounting to a code in itself. For illustrations of "other" Acts in New Zealand, see s. 230 (6) of the Companies Act, 1933, but that is not "another Act" of the kind contemplated by the English Act. Examples of "another Act" within s. 20 are the Public Bodies' Leases Act, 1908, the Coal-mines Act, 1925, s. 159, the Water-supply Act, 1908, s. 48, the Government Life Insurance Act, 1908, s. 20, and the Land Act, 1924, s. 86. The effect of holding that s. 20 of the Act of 1938 does not apply to this arbitration would be an implied repeal of the provision as to costs in the Schedule to the Public Bodies' Leases Act, 1908 ; and the leasing authority would be deprived of a statutory and contractual right to have all the costs paid by the lessee.

- D. If s. 14 does apply, then the provision as to costs is saved by the proviso to s. 14 (1). As the provisions in the Schedule to the Public Bodies' Leases Act, 1908, are mandatory, there must be an arbitration, and, therefore, the reasonable inference is that the future dispute as to the rent must be deemed to have arisen at the time when the lease was made : and this happens before each successive term.

- G. G. G. Watson, for John Duthie and Co., Ltd., to oppose. The only question is whether the arbitration in these proceedings is an arbitration under the Arbitration Act, 1908, or an arbitration under another Act. Before the Arbitration Act, 1908, the disputes under these leases were described as valuations and did not come under the Arbitration legislation. The valuers were experts and did not hold a hearing, or observe other formalities. Under the Arbitration Act Amendment Act, 1906, for the first time arbitration included a "valuation." The question of costs then became important. The provision could easily be abused at the expense of the lessee. The lessees sought relief : see *Russell on Awards*, 13th Ed. 614, 624. Section 20 of the Arbitration Amendment

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Act, 1938, applies to all statutes of the type cited, where rights and duties are created by the statute and where the statute provides a tribunal for deciding disputes arising out of those reports and duties—*e.g.*, s. 86 of the Land Act, 1924, which is a code for conducting the arbitration, and the Act is itself the sub-
mission. In s. 48 of the Water-supply Act, 1908, the submission is contained in the contract by direction of the statute. Each such Act provides a code for regulating the conduct of the arbitration; and while, in each case, such code has brought the Arbitration Act into the code, it is still an arbitration under the particular Act and not under the Arbitration Act. The provisions of the other Act in each case can add to or subtract from the provisions of the Arbitration Act: see, in the Second Schedule to the Arbitration Amendment Act, 1938, the words "do not apply to *statutory* "arbitration," which means an arbitration under a statute which regulates the arbitration. The Public Bodies' Leases Act, 1908, is simply an empowering Act, and the case for arbitration arises only after the parties have voluntarily entered into a contract, and the statute in no way regulates the arbitration: see Local Government Act, 1888, s. 62: see, too, s. 25 of the Arbitration Act, 1908: *Hogg's Law of Arbitration*, 219. The proviso to s. 14 (1) of the Arbitration Amendment Act, 1938, can have no application: the "agreement" there is the lease, and there could be no dispute before it was made. The provision as to costs is not independent, but is part of the general provision as to the submission. There is no provision in the Public Bodies' Leases Act which requires any one to go to arbitration. The only obligation in regard to the arbitration is the contractual obligation contained in the lease itself. The parties go to arbitration under the Arbitration Act, 1908.

Powles, in reply. The provision as to costs has nothing to do with the making of the valuation.

Cur. adv. vult.

MYERS, C.J. This question of costs has had a somewhat curious and interesting history, which was stated at the Bar, and which is well known to those practising members of the profession who over a long period of years have had to deal with the question of revaluation of rental under leases granted by various descriptions of local bodies. Speaking generally, I think it is correct to say that for quite a long period leases of this kind provided that the rental for the new term should be fixed by a valuation

made in accordance with the terms of the lease. Up till 1906 the valuation was in both fact and law a valuation and not an arbitration. Experts were appointed who made the valuation themselves on their own knowledge and experience and without taking
 5 evidence or hearing the parties. The cost of this proceeding was relatively very small, and the provision that the lessee should pay the whole or the greater portion of the expense was a matter of little or no moment. By the Arbitration Act Amendment Act, 1906, now incorporated in the consolidated Arbitration Act, 1908,
 10 the definition of "submission" in the principal Act of 1890 was amended, and the result of the alteration is that a written agreement for a valuation has become a submission. This point is dealt with by *Reed, J.*, in *Hamill v. Wellington Diocesan Board of Trustees*(1). It then became the practice for arbitrators
 15 appointed under these local bodies' leases who were not necessarily experienced valuers themselves to hear evidence at considerable length from numerous witnesses called by the parties, with the result that the costs of the arbitration would sometimes amount to some hundreds of pounds—so that where the lease provided
 20 that the whole or the greater portion of the costs should be borne by the lessee the liability became a serious penalty. An organized body of lessees from time to time protested and sought legislative relief, but without effect. In 1934 there was passed a new Arbitration Act in the United Kingdom—the Arbitration Act, 1934—
 25 and the New Zealand Legislature adopted that measure by the Arbitration Amendment Act, 1938. It is the effect of this amending Act upon the question of the costs of the arbitration in this case that the Court has to determine.

Section 14 (1) of the New Zealand Act corresponds with
 30 s. 12 (1) of the English Act, and enacts that

Any provision in a submission to the effect that the parties or any party thereto shall in any event pay the whole or any part of the costs of the reference or award shall be void; and the principal Act shall in the case of
 35 a submission containing any such provisions have effect as if that provision were not contained therein:

Provided that nothing herein shall invalidate such a provision when it is part of an agreement to submit to arbitration a dispute which has arisen before the making of such agreement.

Now the leases in this case, which are granted under s. 5 (e) of the
 40 Public Bodies' Leases Act, 1908, and which incorporate the provisions of the First Schedule to that Act, provide that the provisions therein contained for the making of a valuation shall be deemed to be a submission to arbitration under and within the meaning of the Arbitration Act, 1908, or any enactment for the

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time being in force in substitution therefor or amendment thereof, and that all the provisions of any such enactment shall, so far as applicable, apply accordingly. It is common ground that this case comes primarily within the substantive portion of s. 14 (1) of the Amendment Act of 1938, though Mr. *Powles* contends— 5
and I shall refer to this contention later—that it is excepted by the proviso. But, first, Mr. *Powles* contends that s. 14 (1) does not apply to the case because of s. 20 of the Act corresponding with s. 20 of the English Act, which enacts :

This Act, except the provisions thereof set out in the Second Schedule 10
to this Act [which excepted provisions include the first subsection of s. 14] shall apply in relation to *every arbitration under any other Act* passed before or after the commencement of this Act as if the arbitration were pursuant to a submission and as if that other Act were a submission, except so far as 15
this Act is inconsistent with that other Act or with any rules or procedure authorized or recognized thereby.

The question then is whether or not the arbitration in this case is an arbitration "under any other Act." If it is, then s. 14 (1) would have no application, and that would determine the present controversy in favour of the lessor. 20

In my opinion, this arbitration is an arbitration under the Arbitration Act and not "under any other Act." Statutory arbitrations—i.e., arbitrations under other Acts—are mentioned in s. 25 of the Arbitration Act, 1908, as in s. 24 of the Arbitration Act, 1889, of the United Kingdom. This type of arbitration is 25
referred to in *Hogg's Law of Arbitration*, 219, thus :

The third great type of modern reference is that in which the authority of the referee or arbitrator derives neither from an order of the Court nor from an agreement between the parties, but from the terms of an Act of Parliament. 30

The learned author points out that in references under Act of Parliament the proceedings are governed primarily by the express provisions of the statute itself, but that although such provisions may expressly or by implication exclude the Arbitration Acts, nevertheless in the vast majority of cases there is no provision 35
for the exclusion of the Arbitration Act, in which case the Arbitration Act applies in its entirety to the type of reference in question subject only to the necessary implications of the express provisions of the special Act. There are several instances of statutory arbitration in New Zealand. For example, there is 40
s. 230 of the Companies Act, 1933, subs. 6 of which enacts that an arbitration as mentioned in subs. 3 shall be conducted in accordance with the provisions of the Arbitration Act, 1908, but the arbitration is expressly referred to in subs. 6 as an arbitration "under this section." So in the Coal-mines Act, 1925, s. 159, 45
subs. 1 enacts that any matter in dispute which by that Part of the

Act is to be settled by arbitration shall be referred to arbitration as therein provided. Subsection 3 refers to arbitrations "*under this Act*." Again, s. 20 (1) of the Government Life Insurance Act, 1908, enacts that where any dispute arises between the Commissioner and any person who has contracted for an annuity or payment "*under this Act*" such dispute shall be referred to arbitration; and subs. 3 enacts:

10 The provisions of the Arbitration Act, 1908, shall so far as applicable apply to references to arbitrators and arbitrations *under this Act* as if the parties had entered into a written agreement to refer the matters in dispute to arbitration.

Sections 200 and 210 of the Land Act, as to which there is a proviso to s. 86 (3) of the Act that all costs of or incidental to any arbitration under either of those sections shall be paid by the lessee, are clear instances of statutory arbitrations. All the cases to which I have referred are, I think, cases which would come within the words in s. 20 of the Arbitration Amendment Act, 1938, "*arbitration under any other Act*." The arbitration in this case, however, in my opinion is quite different. It is quite true that where a lease is granted by a leasing authority under s. 5 (e) of the Public Bodies' Leases Act the provisions of the First Schedule to the Act are mandatory on the leasing authority. That Schedule provides that a lease granted under para. (e) of s. 5 "may contain the following provisions or any provisions substantially to the same effect." I think that the leasing authority is bound to include in the leases that it grants under para. (e) of s. 5 the prescribed provisions, or provisions to substantially the same effect. But the Act itself is merely an empowering Act which empowers the leasing authority, *inter alia*, to enter into a certain form of agreement for arbitration. The lessee is bound not by the Act, but by the terms of the lease. The First Schedule to the Act says that a lease granted under para. (e) of s. 5 shall be deemed to be a submission to arbitration. But it says more than that: it goes further and says not merely, as is sometimes the case where a special Act provides for a statutory arbitration, that the provisions of the Arbitration Act shall apply thereto, or even that such arbitration shall be deemed to be a submission or arbitration within the meaning of the Arbitration Act, but that "the provisions herein contained for the making of a valuation shall be deemed to be a submission to arbitration *under* 'and within 'the meaning of' the Arbitration Act, 1908." That is to say, both the Public Bodies' Leases Act, 1908, and the leases granted by the College Governors themselves provide that the provisions for the making of a valuation shall be deemed to be a submission

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to arbitration, not merely within the meaning of the Arbitration Act, 1908, but also *under* that Act. That being so, I do not see how it can be said now that the arbitration is an arbitration "*under another Act*." It is an arbitration under the Arbitration Act, and not a "statutory" arbitration in the sense in which that expression is used in the heading of the Second Schedule to the Act of 1938—i.e., an arbitration "*under any other Act*" in s. 20 with which the Second Schedule is connected. The expression "*under*" an Act is considered in *R. v. Minister of Labour*(1). In my opinion, s. 20 has no application in the present case.

Mr. *Powles* contends that nevertheless s. 14 (1) of the Amendment Act of 1938 does not apply because the provision in the Schedule to the Public Bodies' Leases Act, 1908, as to the costs of the valuation is an independent stipulation and is no part of the submission. I cannot accept that contention. In my opinion, the stipulation as to costs is, within cl. 8 of the Schedule, one of "the provisions herein contained for the making of a valuation." The provision, indeed, as a matter of common knowledge has been universally so regarded inasmuch as in the awards made in the arbitrations under these leases the costs have always been fixed by the arbitrators or umpire as one of the matters with which they had to deal. It would follow from Mr. *Powles's* present contention, however, that the fixing of costs was entirely outside the jurisdiction of the arbitrators or umpire; and, if that were so, then in every case the reasonableness of the costs of valuation might be in contest, and in that case the lessor would have to sue on an independent contract to pay the costs. The truth is, I think, that but for the special provision as to the costs of the valuation, the whole question and incidence of costs would have been at large and in the discretion of the arbitrators. All that the special provision does really is to vary the provision that would otherwise have been implied as a term of the submission by the Second Schedule to the Arbitration Act, 1908. Mr. *Powles* admits—rightly as I think—that under the special provision (apart of course from the Arbitration Amendment Act, 1938) the arbitrators or umpire had power, and it was their duty, to fix the costs but they were prevented from dealing with the incidence of such costs because that was dealt with already by the special provision.

Mr. *Powles* also contends that s. 14 (1) does not apply because of the proviso thereto which says that nothing in the subsection shall invalidate the provision as to payment of costs if it is part of an agreement to submit to arbitration a dispute which has

arisen before the making of the agreement. It is quite true that under the Schedule to the 'Public Bodies' Leases Act, 1908, and the leases granted by the College Governors the amount of rental for a renewal term must be fixed by arbitrators. This would
5 appear to be so even though the parties are not in dispute. It frequently happens that they are not in dispute, and that an arbitration is set up merely for the formal purpose of fixing (without further inquiry) the amount of rent upon which the parties have already agreed. In such circumstances, it can hardly be said
10 that there is in fact a dispute. But even if it can, in order to come within the proviso to s. 14 (1) a dispute must have arisen before the making of the agreement. Obviously, at least so it seems to me, that cannot be said in this case.

In my opinion, the application fails and must be dismissed.

Motion dismissed.

Solicitors for the College Governors: *Brandon, Ward, Hislop, and Powles* (Wellington).

Solicitors for John Duthie and Co., Ltd: *Chapman, Tripp, Watson, James, and Co.* (Wellington).

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Oct. 4.MYERS, C.J.
BLAIR, J.
KENNEDY, J.
NORTH-
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CORPORATION.

Rating—Rateable Property and Exemptions—“Waterworks”—Whether s. 244 of the Municipal Corporations Act, 1933, to be invoked for interpretation of the Exemption Provision in the Rating Act, 1925—Rating Act, 1925, s. 2 (k)—Municipal Corporations Act, 1933, s. 244.

Paragraph (k) of s. 2 of the Rating Act, 1925, which excepts from the definition of “rateable property” “waterworks belonging to or under the control of any Borough Council” must be read together with and in the light of s. 244 of the Municipal Corporations Act, 1933, which defines “waterworks.”

Timaru Harbour Board v. Timaru Borough(1) followed.

(1) [1926] N.Z.L.R. 210 ; [1925] G.L.R. 217.

ORIGINATING SUMMONS asking for a declaratory order interpreting the provisions of s. 2 of the Rating Act, 1925, and in particular determining whether a certain piece of land situate in the Borough of Petone, containing 3 acres 2·2 perches, was rateable property within the meaning of that section. By consent the originating summons was removed into the Court of Appeal for argument.

The above-mentioned piece of land was vested in the defendant Corporation, and was divided into two parts by a public street. Upon one part of the said land the Wellington City Council had sunk an artesian bore of a diameter of 3 in., of which the outlet protruded 18 in. at the surface of the ground. No bore had been sunk upon the other part of the said land. The land was leased from year to year for grazing purposes at a rental of £12 per annum.

The Wellington City Council did not obtain water from the said land, and had never done so, but the Wellington City Council might at any time after April 1, 1946, take such water for the supply of the City of Wellington, and might before that date with the consent of the Petone Borough Council, the Lower Hutt Borough Council, and the Hutt County Council so take such water.

The land on which the said bore was constructed was acquired by the defendant Corporation for the purpose of waterworks, as defined in s. 244 of the Municipal Corporations Act, 1933, and a proposal had been put forward by the Wellington City and Suburban Water-supply Board for the control and protection of

the whole of the artesian water in the Hutt Valley. This might necessitate or authorize the use of this water-supply at any time.

The land was leased for grazing purposes only, so that the tenant might keep down grass to prevent fires, might look after 5 fences, and prevent intruders interfering with the bore plant.

R. E. Harding, for the plaintiff.

O'Shea and Marshall, for the defendant.

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Harding, for the plaintiff. The land is not rateable as "water-works" within the meaning of that term in para. (k) of 10 the definition of "rateable property" in s. 2 of the Rating Act, 1925; if it were, it would be rateable as ordinary land.

O'Shea, for the defendant, refers to s. 244 of the Municipal Corporations Act, 1933.

Harding, continues. If that be applicable, the land comes 15 within that definition; the land is not and never has been waterworks. The term "waterworks" in the Rating Act, 1925, has no technical meaning: *Craies on Statute Law*, 4th Ed. 68. The Court cannot look outside the Rating Act, 1925, because the word is well known in its natural or primary meaning. It is not a word 20 of doubtful import, and reference cannot be made to any other statute for its meaning.

O'Shea, for the defendant. The land comes within the exemption in para. (k) of the exemptions to the definition of rateable property in s. 2 of the Rating Act, 1925. The definition 25 in s. 244 of the Municipal Corporations Act, 1933, applies: cf. s. 312 of the Municipal Corporations Act, 1886. The land was acquired for waterworks. The Corporation cannot acquire land except within its powers: once the purpose were diverted it would become rateable unless used for some other authorized purpose.

30 The exemption section (s. 341) of the Municipal Corporations Act, 1886, was considered in *Mayor, &c., of Dunedin v. Hislop*(1), after which the exemption of "waterworks" from rating was included in s. 117 of the Municipal Corporations Act, 1900, and remained in that statute until 1908, when it was transferred to the 35 Rating Act, 1908, which was merely a matter of draftsmanship, but the law remained the same.

In *Timaru Harbour Board v. Timaru Borough*(2) the definition of "harbour-works" in the Harbours Act, 1923, was invoked to interpret that term in s. 2 (k) of the Rating Act, 1908.

(1) (1887) N.Z.L.R. 5 S.C. 492.

(2) [1926] N.Z.L.R. 210; [1925] G.L.R. 217.

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The Court of Appeal(3) referred to the decision in *Wellington City Council v. Wellington Harbour Board*(4) and treated as immaterial whether the exemption was contained in the Municipal Corporations Act or in the Rating Act.

Even if a bore had not been put down, as the land was acquired for the purposes of waterworks it would be exempt from rating.

[To MYERS, C.J.] The defendant cannot hold this land except as waterworks: its powers are derived from s. 245 of the Municipal Corporations Act, 1933.

Harding, in reply. The defendant must comply with the provisions of the Municipal Corporations Act, 1933, but this has no bearing on the question whether or not land comes within the exemption of waterworks under the Rating Act, 1925. There is an express exemption from rates of other land vested in the defendants for, *inter alia*, waterworks: Wellington City and Suburban Water-supply Act, 1927, s. 5.

The *Timaru* case(5) was decided *per incuriam*, as the decision in the *Wellington City Council v. Wellington Harbour Board*(6) upon which it was based is inconclusive on the point of construing the rating provisions in the Municipal Corporations Act, 1886, by s. 153 of the Harbours Act, 1878; and there is nothing to show that the Court adopted the definition in the Harbours Act.

The reference in the *Timaru* case to the outside statute can rest only on the ambiguity of the term "harbour-works," and there is no analogy with "waterworks" which is not an ambiguous term.

In *Otago Harbour Board v. Dunedin City Corporation*(7) there was no definition of "harbour-works" in the Rating Act, and no reason is given for not defining it. The fact that there is no definition of a term does not exonerate the Court from giving a meaning to it.

There is no rule that a consolidating Act does not alter the law; unless the language is altered: *Irvine and Co., Ltd. v. Dunedin City Corporation*(8); *Minister of Customs v. McParland*(9); *The King v. Hare*(10); *Public Trustee v. Sheath*(11); and see *In re Hoffman*(12).

(3) *Ibid.*, 216, 217; 221.

(4) (1891) 10 N.Z.L.R. 534.

(5) [1926] N.Z.L.R. 210, 216; [1925] 217, 221.

(6) (1891) 10 N.Z.L.R. 541.

(7) (1881) N.Z.L.R. 3 S.C. 293.

(8) [1939] 2 N.Z.L.G.R. 51.

(9) (1909) 9 N.Z.L.R. 279; 12 G.L.R. 229.

(10) (1910) 29 N.Z.L.R. 641; 12 G.L.R. 605.

(11) [1918] N.Z.L.R. 129; G.L.R. 92.

(12) (1909) 12 G.L.R. 220.

O'Shea refers to the Wellington City Empowering Act, 1929, s. 5.

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The judgment of the Court was delivered by

- 5 MYERS, C.J. By this originating summons the Court is asked to determine whether certain land in Petone belonging to the Wellington City Corporation is upon the agreed statement of facts rateable property within the meaning of s. 2 of the Rating Act, 1925.
- 10 The land is rateable unless it comes within the exception in para. (k) of the exceptions to the definition of "rateable property" in s. 2 of the Rating Act. The exception in para. (k) is expressed thus: "Waterworks belonging to or under the control of any
- 15 "Borough Council, and wharves, river protection, and harbour-works under the control and management of any Harbour Board."

- The land in question, though acquired by the Wellington City Corporation for the purpose of waterworks and though an artesian bore with an outlet protruding 18 in. above the surface has been
- 20 sunk upon it, is not being used, and cannot prior to April 1, 1946, be used except with the consent of the Petone Borough Council and certain other local authorities, for the purpose of taking water from the land for the supply of the City of Wellington. That being so, Mr. *Harding* contends—and Mr. *O'Shea* does not dispute
- 25 —that, if the question depended upon the wording of para. (k) alone, the land could not be said to come within the primary and ordinary meaning of the word "waterworks." Mr. *O'Shea* contends, however, that para. (k) must be read together with and in the light of s. 244 of the Municipal Corporations Act, 1933. The
- 30 part of that Act commencing with s. 244 is under the general title of "Waterworks," and subs. 1 of the section is as follows:—

- In this Part of this Act, if not inconsistent with the context, "water-works" includes all streams and waters and all rights appertaining thereto, and all lands, watersheds, catchment areas, reservoirs, dams, tanks, and
- 35 pipes, and all buildings, machinery, and appliances of every kind acquired or constructed by the Council under the authority of this Act for collecting or conveying water for or to the borough or any part thereof, or beyond the borough.

- Mr. *Harding* properly admits that if the paragraph of the Rating
- 40 Act is to be read together with and in the light of s. 244 of the Municipal Corporations Act, the land in question comes within the wide definition of "waterworks" in s. 244 and would be exempt from rates. His contention is that s. 244 cannot be invoked for the purpose of interpreting the exemption provision
- 45 in the Rating Act.

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In our opinion, the question is concluded by the decision of this Court in *Timaru Harbour Board v. Timaru Borough*(1). True, that was a case on the question not of waterworks, but of harbour-works, and *Ostler, J.*, delivering the judgment of the Court, said: "There is no definition of 'harbour-works' in the Rating Act, 1908, but it has been settled by the Court of Appeal in *Wellington City Council v. Wellington Harbour Board* (10 "N.Z.L.R. 534) that the definition of that term in the Harbours Act is to be adopted in the construction of s. 2 (k) of the Rating Act"(2). If the Harbours Act is to be invoked for the purpose of interpreting the meaning of "harbour-works," then the Municipal Corporations Act must be similarly invoked for the purpose of interpreting the meaning of the word "waterworks." Indeed, the expression in the exemption paragraph is not simply "waterworks," but "waterworks belonging to or under the control of any Borough Council." Seeing that a Borough Council can own waterworks or have waterworks under its control only by the authority of a statute, it seems to us to be necessary to go to the authorizing statute to see what the words of the exempting paragraph mean. That would have been our view apart from authority, but, as we have said, the decision in the *Timaru* case seems to conclude the point. Mr. *Harding* contends that the statement which we have already quoted from the judgment in that case was made *per incuriam* in that, so he contends, the judgment in the *Wellington Harbour Board* case referred to by *Ostler, J.*, is quite inconclusive upon the point whether or not the Court construed the rating provisions (which as we shall show directly—but this is really immaterial—were then contained in the Municipal Corporations Act) by reference to the Harbours Act. The Court of Appeal in the *Wellington Harbour Board* case may not have said in terms that it invoked the provisions of the Harbours Act for the purpose of interpreting the expression "harbour-works" in the rating provision, but, nevertheless, it is necessarily to be inferred from the judgment that that is what the Court did. Be that as it may, the Court in the *Timaru* case undoubtedly decided that the definition of "harbour-works" in the Harbours Act must be invoked for the purpose of interpreting the same expression in the Rating Act: see also *Otago Harbour Board v. Dunedin City Corporation*(3) to the like effect.

On that view of the case it is unnecessary to consider whether or not the history of the legislation can be looked at. It is satis-

(1) [1926] N.Z.L.R. 210; [1925] (2) *Ibid.*, 216, 217; 221.

G.L.R. 217.

(3) (1881) N.Z.L.R. 3 S.C. 293.

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factory to know, however, that if a consideration of the history of the legislation is permissible, such consideration would show conclusively that the view taken in the *Timaru* case is correct. Up to the year 1908 the provision exempting waterworks from rates was contained in the Municipal Corporations Act, the Act, of course, in which the provisions in regard to "waterworks" and the definition of that term were also contained. Curiously enough, the exemption provision referred to "harbour-works" as well as waterworks, though the Municipal Corporations Act itself had no connection with harbour-works. The provision was thus expressed: "No waterworks belonging to or under the control of any Council, and no wharves, river-protection and harbour works under the control and management of any Harbour Board, shall be liable to be rated by any local authority within the meaning of the Rating Act, 1894." That was the provision contained in s. 117 of the Municipal Corporations Act, 1900. There had been a provision to the same effect in s. 341 of the Municipal Corporations Act, 1886, which section was in force at the time of the decision in the *Wellington Harbour Board* case(4). It was no doubt incongruous to have in the Municipal Corporations Act an exempting provision relating to harbour-works which would seem more naturally to come into the provisions of the Harbours Act, and in any case it would seem more appropriate that exemptions from payment of rates should be provided for in a rating Act rather than in either the Municipal Corporations Act or the Harbours Act. For these or other reasons in the general Consolidation of Statutes in 1908 the Consolidation Commissioners lifted the exemption from the Municipal Corporations Act and placed it in the Rating Act amongst the exemptions from the definition of rateable property. Had the provision remained in the consolidated Municipal Corporations Act, 1908, and in the subsequent consolidations of the law relating to municipal corporations, the question raised by the present originating summons could not possibly have arisen, and it is impossible to suggest that any change in the law was intended merely by taking the exemption provision out of the Municipal Corporations Act and placing it in the Rating Act. The Municipal Corporations Act, 1908, the Harbours Act, 1908, and the Rating Act, 1908, were passed contemporaneously, so that, if the meaning of "waterworks" or "harbour-works" had arisen under the Rating Act, 1908, the Court would have looked at the Municipal Corporations Act or the Harbours Act for an interpretation of

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the relevant term: *Otago Harbour Board v. Dunedin City Corporation*(5). It would be a strange result if that position were altered and the law changed by the mere fact that these various Acts and subsequent amendments have passed through a further stage of codification but without any alteration in the material provisions. 5

In our opinion, the land in question comes within the exemption and is not rateable property within the meaning of s. 2 of the Rating Act, 1925. The question asked by the originating summons is answered accordingly. 10

Question answered accordingly.

Solicitors for the plaintiff: *Meek, Kirk, Harding, and Phillips* (Wellington).

Solicitor for the defendant: *John O'Shea* (Wellington).

(5) (1881) N.Z.L.R. 3 S.C. 293.

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April 29 ;

May 6.

MYERS C.J.

Road Traffic—"Heavy Motor-vehicle"—"Motor-lorry"—"Maximum load"—Whether Motor-vehicle to which Heavy-traffic License refused, the Gross Weight of which and its Load exceeds Two Tons, within the Heavy Motor-vehicle Regulations, 1932—Public Works Act, 1928, s. 166—Motor-vehicles Act, 1924, s. 2—Heavy Motor-vehicle Regulations, 1932 (1932 New Zealand Gazette, 302), Regs. 1 (2), 5 (7), and 9 (9).

The purpose of the Heavy Motor-vehicle Regulations, 1932, is to prevent from operating on the road a vehicle, which, in fact, together with its load, exceeds two tons, unless it is licensed as a heavy motor-vehicle.

The regulations, therefore, apply to a motor-vehicle in respect of which a heavy-traffic license has been refused upon the ground that the construction of the vehicle was such that it could not safely carry a load of sufficient weight to bring the gross weight of the vehicle and its load above two tons. The operation of such a vehicle upon the road, when the gross weight of vehicle and load exceeds two tons, is an offence.

APPEAL from the determination of a Stipendiary Magistrate.

The respondent's vehicle was a Ford half-ton truck, the tare weight of which was 1 ton 3 cwt., and the manufacturers' rating of the capacity was 10 cwt. It was proved or admitted at the 5 hearing before the Magistrate that the respondent did operate the vehicle on September 20, 1939, the date in respect of which he was charged, and that the gross weight of the vehicle and its load was 2 tons 4 cwt. 2 qr. It was also proved or admitted that no heavy-traffic license had been obtained in respect of the 10 vehicle in accordance with the provisions of the Heavy Motor-vehicle Regulations, 1932. The learned Magistrate stated in the case that it was also proved or admitted that, after September 20, 1939, and before the date of hearing before the Magistrate, the respondent applied to the Wellington City Council for a heavy- 15 traffic license in respect of the vehicle, and tendered the amount of the fees payable for such license; but the Council refused to issue a license and to accept payment of the amount of the fees so tendered, upon the ground that the construction of the vehicle was such that it could not safely carry a load of sufficient weight 20 to bring the gross weight of the vehicle and its load above two tons. In these circumstances, the learned Magistrate held that inasmuch as the vehicle could not be licensed under the Heavy Motor-vehicle Regulations, 1932, it was not a heavy motor-vehicle, and that, consequently, the respondent was not guilty of the 25 offence charged. He, therefore, dismissed the information.

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O'Shea, for the appellant. As to the definition of "heavy motor-vehicle," see the Heavy Motor-vehicle Regulations, 1932, Reg. 1 (2), and the Public Works Act, 1928, under s. 166 of which the "maximum" load is the greatest load at any time carried on the vehicle: see Motor-vehicles (Registration-plate) Regulations, 1934 (1934 *New Zealand Gazette*, 1225), Reg. 5 (i) and (j). "Manufacturer's rating" is different from "maximum load" in s. 166 of the Public Works Act, 1928: see Motor-vehicles Act, 1924, s. 36 (p). As to the meaning of "maximum," see 6 *Oxford English Dictionary*, Pt. II, 254. The fact that the respondent could not get a license does not excuse him: he is still guilty of the offence of operating a heavy motor-vehicle without a license. If he were entitled to a license, and was refused, his remedy was mandamus. There are two offences: see Regs. 5 (7) and 9 (9). The latter regulation covers two classes of vehicle: (a) a vehicle for which a license could be obtained, and (b) a vehicle for which a license could not be obtained owing to the danger of its being permitted to carry an excessive load: *Wellington City Corporation v. Wellington Fire Board*(1).

Pope, for the respondent. There are two reasons why the vehicle is not a "heavy motor-vehicle" within the meaning of the regulations. First, the regulations themselves were never designed to meet this class of case. The purpose of the regulations is to regulate the position of motor-vehicles capable of carrying loads, which, with the weight of the vehicle, exceed two tons. Secondly, apart from the general purpose of the regulation, the definition of "heavy motor-vehicle" in Reg. 1 (2) does not include the respondent's vehicle. The regulation deals with the case of the load that a vehicle is capable of carrying irrespective of the load which at any time it is actually carrying: *Rink Taxis Ltd. v. Macintosh*(2). In s. 166 of the Public Works Act, 1928, "maximum" means the maximum that the vehicle can carry. That interpretation is helped by the words "carrying capacity" in s. 166 (2) (a) and (2) (g). The regulations were made under the Public Works Act, 1928: see Reg. 1 (5). The real offence is in overloading a vehicle so as to be unsafe for use on the highway.

O'Shea, in reply. Refers to Motor-vehicles Act, 1924, s. 28 (1), and Motor-vehicles Amendment Act, 1936, s. 4.

Cur. adv. vult.

(1) [1934] N.Z.L.R. s. 3; G.L.R. 95. (2) [1933] N.Z.L.R. s. 75; G.L.R. 357.

MYERS, C.J. Clause 9 (9) of the Heavy Motor-vehicle Regulations, 1932, provides that :

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Neither the owner of any heavy motor-vehicle nor any other person shall operate any heavy motor-vehicle upon any road unless and until a heavy-traffic license has been obtained in accordance with these regulations.

There are certain exemptions, but there is no suggestion that any such exemption applies in the present case. The respondent was charged on an information laid under that regulation that on September 20, 1939, he did operate a heavy motor-vehicle on Allen Street in the City of Wellington without having obtained a heavy-traffic license, though the information adds the words "and paid the fee in respect thereof."

"Heavy motor-vehicle" is defined by Reg. 1 (2) as meaning a "motor-lorry" within the meaning of s. 166 of the Public Works Act, 1928, and including any motor-vehicle within the meaning of the Motor-vehicles Act, 1924 (other than a private motor-car as defined by the said Act), which with the greatest load it is at any time carrying exceeds two tons in weight. By s. 166 of the Public Works Act "motor-lorry" includes every motor-vehicle (other than a private motor-car as defined by the Motor-vehicles Act, 1924) "which with its maximum load exceeds two tons in weight."

[His Honour then stated the facts, as above, and proceeded:] I find myself unable to agree with the learned Magistrate's view. The expression "maximum load" in both s. 166 of the Public Works Act and the regulations made thereunder is not, in my opinion, the same thing as either carrying-capacity or manufacturer's rating. I think that the purpose of the regulations is to prevent from operating—i.e., using and driving—on the road a vehicle which in fact together with the weight of its load exceeds two tons, unless it is licensed as a heavy motor-vehicle; and in fact this particular vehicle was being operated on September 20 on a road in the City of Wellington without being licensed as a heavy motor-vehicle. Indeed, the respondent does not seem up to that time to have even made an application for a license. It was not till later that he made an application and ascertained that the City Council could not see its way to grant a license.

Clause 5 (7) of the regulations provides that no person shall operate any heavy motor-vehicle carrying a greater load than the maximum load it is licensed to carry. That, of course, does not apply in this case, because the respondent had no heavy motor-vehicle license at all. But Mr. Pope seeks to use cl. 5 (7) to support his contention that if a license cannot be obtained for

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a vehicle as a heavy motor-vehicle there is no offence against the regulation if such vehicle is in fact used to carry a load so as that the combined weight of vehicle and load exceeds two tons. In other words, he claims the right for the respondent, so far as these regulations are concerned, to carry habitually on this particular vehicle such a load as that the combined weight of vehicle and load exceeds two tons. In my opinion, the contention is unsound. Either the respondent is, or he is not, entitled to a heavy motor-vehicle license. If he is entitled and the City Council has wrongly refused to give him a license, he has his remedy by mandamus. If he is not entitled to such a license but nevertheless "operates" his vehicle so as to bring it in fact within the definition of "motor-lorry" or "heavy motor-vehicle," I cannot see that he is in any different position from the owner of a motor-lorry who is entitled to a license but who chooses to operate his vehicle without having obtained one. It seems to me that in either case the vehicle is being operated as a motor-lorry or heavy motor-vehicle in that the combined weight of vehicle and load exceeds two tons, and is being operated without a heavy-traffic license having been obtained.

The determination appealed from must be reversed, and the matter remitted to the Magistrate with a direction to enter a conviction.

Appeal allowed.

Solicitor for the appellant: *City Solicitor* (Wellington).

Solicitors for the respondent: *Perry, Perry, and Pope* (Wellington).

